Supreme Court, U.S.
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No. ___ - ___

IN THE
Supreme Court of the United States

RICHARD E. FINLAN,

Petitioner,

vs.

DALLAS INDEPENDENT SCHOOL DISTRICT, SANDY KRESS, CHAD WOOLERY, HOLLIS BRASHEAR, WILLIAM KEEVER, LYNDA McDOW, KATHLEEN LEOS, YVONNE EWELL, LARRY FRIEDMAN, ALAN RICH, FRIEDMAN & ASSOCIATES, P.C., DENNIS EICHELBAUM, and SCHWARTZ & EICHELBAUM, P.C.

Respondents,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

RICHARD E. FINLAN
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39 pp

Question Presented

Whether the Petitioner has a protected right to be free of retaliatory lawsuits filed against him by government because of his exercise of First Amendment rights.

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Smith v. Arkansas State Highway Employees,
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United States v. Cruikshank,
92 U.S. 542 (1875). 20

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RICHARD E. FINLAN,

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DALLAS INDEPENDENT SCHOOL DISTRICT, SANDY KRESS, CHAD WOOLERY, HOLLIS BRASHEAR, WILLIAM KEEVER, LYNDA McDOW, KATHLEEN LEOS, YVONNE EWELL, LARRY FRIEDMAN, ALAN RICH, FRIEDMAN & ASSOCIATES, P.C., DENNIS EICHELBAUM, and SCHWARTZ & EICHELBAUM, P.C.

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Opinion Below

The opinion of the Fifth District Court of Appeals at Dallas, Texas is reported at 27 S.W.3d 220. *See* Appendix pages 1 - 47.

Jurisdiction

The judgment of the Fifth District Court of Appeals was upheld and Finlan's Petition for Review to the Texas Supreme Court [00-1191] was denied. His Motion for Rehearing was denied by the Texas Supreme Court on March 15, 2001. This Court has jurisdiction to review the judgment of the Texas Supreme Court by writ of certiorari pursuant to Title 28, U.S.C.A. 1257.

Question Presented

Whether the Petitioner has a protected right to be free of retaliatory lawsuits filed against him by government because of his exercise of First Amendment rights.

Constitutional Provisions Involved

United States Constitution, Amendment I:

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Statement of the Case

Petitioner, plaintiff below, is a resident of Dallas, Texas, a parent with children who attend Dallas Independent School District ("DISD") schools and, at all times relevant, an owner of DISD

tax exempt bonds.

In 1991, he discovered that DISD had manipulated the issuance of its long term tax exempt bonds in order to help a failing Dallas bank and that millions of dollars of DISD's bond fund proceeds were missing or could not be accounted for.

That year, after DISD withheld from public scrutiny documents concerning these improprieties, Finlan filed suit against DISD seeking declaratory judgment that the school district must open its records to the public and that it had misapplied its long term bond funds and had failed to use these funds for their intended purpose - the construction of schools. There was evidence that the school district had misapplied approximately $25 million of its bond funds to help the failing Dallas bank and that approximately $52.4 million in interest earnings on inactive bond funds were misapplied or missing.

The trial court appointed the Texas Commissioner of Education as master in the case and ordered that he audit DISD's use of its bond funds. The accounting firm hired by the Commissioner, Deloitte & Touche, confirmed that millions of dollars were missing or unaccounted for. This was prior to DISD's 1992 bond election asking the public for still more funds.

Once the audit was finished, Finlan announced that he would be opposing DISD's upcoming bond referendum until such time as "DISD could put its financial house in order."

On September 24, 1992, the DISD board of education held a secret meeting during which the board members and the school district's lawyer, Dennis Eichelbaum, set in action their plan to file a multi-million dollar lawsuit against Finlan. Appendix, pages 48 - 57

Their stratagem was to file a retaliatory lawsuit against Finlan to punish him for his criticism of the school district's finances, his suit which exposed the government's financial shenanigans, for Finlan's critical speech about the DISD in the Dallas media, and, importantly, to force Finlan to give up his vocal opposition to the upcoming bond election.

The school district's attorney, Mr. Eichelbaum, promised the board during the meeting that effect of such a suit would be to ruin Finlan's credit - a punishment for Finlan's First Amendment activities. Appendix - pages 50 - 51. Finlan's credit was in fact ruined by DISD's suit and he went out of business as a home builder.

In its final form, DISD's suit was a complaint alleging defamation of government which demanded millions of dollars because of Finlan's speech and an

additional $270 million if Finlan should do anything to cause DISD to lose its bond referendum in December, 1992. Appendix - pages 57 - 59. DISD's suit against Finlan was a typical government SLAPP[1] suit.

By May, 1993, the trial court, recognizing the illegitimacy of DISD's action, dismissed DISD's suit as a violation of the First Amendment and re-aligned Finlan, who had filed a counterclaim under 42 U.S.C.A. §1983, as plaintiff.

As Finlan's suit against the school district progressed, the board of education became disenchanted with their outside lawyers, Schwartz & Eichelbaum, P.C., and their lack of progress disposing of Finlan's civil rights suit.

By June, 1995, board member Sandy Kress had recruited new lawyers, defendants Larry Friedman

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[1] George W. Pring, SLAPPs: *Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV.3, 5 (1989); *see generally* Penelope Canan, *The SLAPPs from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23 (1989).
See also *Exercise of Constitutional Privilege: Deterring Abuse of the First Amendment - "Strategic Lawsuits Against Political Participation,"* SMU LAW REVIEW, Vol. 47, 95.

and Alan Rich, who promised the DISD board that, given adequate government resources, they could use renewed and more vigorous legal assaults against Finlan to force him to drop his original civil rights suit or to, at least, settle that suit on terms favorable to the government.

These discussions and agreements occurred during a secret DISD meeting on June 22, 1995. Pursuant to those discussions, the DISD board then passed the "June 22, 1995 Resolution," which officially hired Larry Friedman and his law firm to file new suits against Finlan to "resolve" his existing suit. Appendix - pages 60 - 61.

On September 1, 1995, Finlan wrote a letter to school superintendent Chad Woolery requesting campaign finance information held by school board members. On September 6, 1995, Mr. Friedman, representing the DISD and numerous school board members in their individual capacities, filed a declaratory judgment suit against Finlan asking for attorneys fees and costs because of Finlan's public information request. Appendix - pages 62 - 63. Again, Finlan counterclaimed, contending that his First Amendment rights (petition and speech) were violated by the government's retaliatory suit.

On September 13, 1995, Mr. Friedman filed, on behalf of DISD, a RICO, mail fraud, wire fraud and

civil conspiracy lawsuit against Finlan claiming that Finlan's original civil rights suit was an attempt to defraud the government. The petition asked for more than one $million in damages. Appendix - pages 64 - 66.

Finlan re-alleged that this campaign of retaliatory litigation was violative of his protected rights and that all of these suits were a tactical weapon by the government that were designed only to retaliate against him, to punish him, and to get Finlan to drop his original suit or, at least, to settle on terms favorable to the government.

Thereafter, in the hours before Finlan's motion for summary judgment, the government's racketeering suit was dropped and replaced by a new suit claiming civil conspiracy against Finlan.

The trial court 'cleared the courtroom,' granting all defensive motions for summary judgment and, essentially, dismissing all claims. The government appealed and Finlan cross-appealed.

The Dallas Court of Appeals Opinion

Appendix - pages 1 - 47.

The Dallas Court of Appeals, assuming, for purposes of its ruling, that all of the lawsuits filed against Finlan had been done for retaliatory purposes as punishment for his exercise of First Amendment rights, concluded that:

"there is no clearly established right to claim a First Amendment violation from the filing of a civil lawsuit, even one alleged to be malicious prosecution, in retaliation for the exercise of free speech rights."
Appendix - page 42.

The Dallas Court of Appeals decided Finlan's case on the threshold issue of standing, taking the position that Finlan had no right to be free of government retaliation and that his suit should be dismissed.

Based on this theory, governments would be allowed to use expensive retaliatory suits against citizens who, as Finlan did, petition their government or otherwise exercise First Amendment rights.

Summary of Argument

In this case, the Dallas Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court and numerous Federal Courts of Appeals, including decisions of Finlan's home Circuit, the Fifth.

The Texas Supreme Court has sanctioned this departure of the lower court from existing federal law and, by doing so, necessitates this Court's supervisory powers.

It established a new and unique *"Texas Rule of*

Law" which simply eliminates and by passes federal rights. The *Texas Rule of Law* is particularly obnoxious in a republic because unencumbered political speech and the exercise of the right to petition government, free from retaliation is at the center of First Amendment protections.

The new *Texas Rule of Law* now allows governmental entities to target and retaliate against those who circulate petitions for signatures, voice criticism of government, request public information, write critical articles about government, file complaints or suits complaining of government conduct and a whole host of other previously protected First Amendment activities.

Most of all, the First Amendment protects speech, even the simple act of asking the government for public information, on matters of public concern and it should prevent the state from interfering with such activities. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The new *Texas Rule of Law* disregards established principles of law that have been developed to prevent the kind of selective punishment of citizens that has occurred in this case. There are a wealth of cases that should have governed the ruling below, including *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977) where direct retaliation by the

state for having exercised First Amendment freedoms was proscribed by the Constitution and found actionable pursuant to 42 U.S.C.A. §1983.

It is undisputed that the decision to wage a campaign of retaliatory lawsuits against Finlan was both executive and legislative, where the government enacted the June 22, 1995 Resolution, not as a law of general application, but one which targeted Finlan by name for the goal of forcing him suspend his petitioning activity. The unconstitutional motivation of the government defendants is admitted by its own legislative action.

Additionally, the lower court completely overlooked the fact that Finlan was the target of retaliatory lawsuit because of his speech - his letter asking for public information - and the fact that, in Texas, it is illegal for government to sue an individual who asks for public information. *See* Texas Government Code §552.325(a).

Under the new Texas scheme, citizens can now exercise First Amendment rights only by placing themselves in a perilous situation where government has the right to retaliate once those rights are exercised.

ARGUMENT

Introduction

Retaliatory lawsuits by government have "chilling effect" on the exercise of First Amendment freedoms. The "chilling effect" is not only felt by the target but by members of the public who become aware of such retaliation by government. Defending a government SLAPP suit is an expensive economic sanction, time consuming, and a scary proposition since the outcome of such a suit is never certain. Even if the target prevails at the trial court, the government can perpetuate the economic punishment by continuing the case on appeal.

The court in *Johnson City v. Cowles Communications, Inc.*, 477 S.W. 2d 750, 754 (1972) succinctly pointed out the problem of retaliatory government lawsuits when it stated that "[I]t is difficult to imagine anything more destructive of democratic government than the power in the hands of a corrupt government to stifle all opposition by free use of the public treasury to silence critics by suit."

The Basics of the Texas court's opinion

The Texas opinion below erroneously relied on *Johnson v. Louisiana Department of Agriculture*, 18 F.3d 318 (5th Cir.1994), to conclude that government has the right to engage in a malicious criminal prosecution in retaliation for the exercise of First

Amendment freedoms. It then concluded that governments may also file retaliatory civil lawsuits against those who exercise First Amendment freedoms.

The Texas court decided the case on the threshold question (standing) of whether or not Finlan had any right at all to be free of government retaliation for the exercise of First Amendment rights.[1] Plainly, the court concluded that Finlan did have a right to speak and petition government but, once exercised, he had no claim under the constitution to be free of retaliation.[2]

Government retaliation now permitted in Texas

The Texas court relied on a single case to

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[1] "[T]he legal right at issue in this case is Finlan's right not to be subjected to a civil suit for allegedly exercising his free speech rights and for invoking his right to access the courts." DISD v. Finlan, 27 S.W.3d 220 (Tex. App.--Dallas 2000)

[2] "[T]here is no clearly established right to claim a First Amendment violation from the filing of a civil lawsuit, even one alleged to be malicious prosecution, in retaliation for the exercise of free speech rights." *Id.*

create this new theory of law that allows for government retaliation across the state of Texas, *Johnson v. Louisiana Dept. of Agriculture.* The Texas court's entire analysis of *Johnson*:

"[T]he operator of a defunct crop dusting business brought a section 1983 action against the Louisiana Department of Agriculture and its commissioner, contending that they had violated his First Amendment rights by bringing a series of administrative proceedings against him and his business. The trial court held that these allegations failed to state a claim under section 1983 for violation of the plaintiff's First Amendment rights, and the Fifth Circuit affirmed. *Id.* at 321. The court first noted that if plaintiff's allegations asserted a claim on any basis, 'the claim is one for malicious prosecution in violation of Johnson's First Amendment rights.' *Id.* at 320. The *Johnson* court then observed that '[w]hether the Constitution comprehends any such claim *is far from clear.*'" *DISD v. Finlan* 27 S.W.3d 220.

Aside from the misinterpretation of *Johnson*, it is a misstatement of constitutional principles to conclude from *Johnson* that the Bill of Rights no longer enjoy constitutional protection from government retaliation.

New limits on the right to petition government

Additionally, although the Texas court below

did concede that Finlan's right to petition government was a well established right, *citing* Roland v. Shapiro, 708 F.2d 967, 971-72 (5th Cir. 1983), the Texas court severely altered the scope of the constitutional right of petition, *citing* Foster v. City of Lake Jackson, 28 F.3d 425, 429 (5th Cir. 1994), by concluding that the right in question was facilitative only - that, as long as the plaintiff was able to file his petition in the courthouse, there could be no violation of the plaintiff's right to petition when government takes retaliatory actions against him for having done so.

Elimination of the 1983 remedies for malicious prosecutions done in retaliation for First Amendment exercises

Then, continuing to create constitutional doctrine out of whole cloth, the Texas court concluded that, since Finlan had, indeed, filed this suit, his filing of a civil rights suit extinguished his own civil rights claim. If this doctrine were allowed to stand, it would create an anomaly whereby 42 U.S.C. §1983 would only vindicate the rights of people who never sue.

Discussion

As noted above, the Texas court relied heavily on *Johnson v. Louisiana Dept. of Agriculture*, 18 F.3d 318 (5th Cir. 1994) to fashion its theory that Finlan has no right to be free of retaliatory lawsuits by

government for the exercise of First Amendment rights. *Johnson* was a Fifth Circuit case where Johnson, who was found guilty on numerous occasions on criminal complaints (including assault), filed suit alleging that he was actually the object of malicious criminal prosecutions because of his speech. Although Johnson initially claimed First Amendment retaliation, he was ordered by the trial court to replead this cause of action and he did not do so, which resulted in its dismissal. His First Amendment claim was not thereafter addressed by the Fifth Circuit.

However, Johnson continued to embellish his, essentially Fourteenth Amendment due process claim[2], with allegations that his earlier criminal prosecutions were done solely because of his speech critical of Department of Agriculture personnel. The court in *Johnson*, correctly recognizing that the plaintiff's First Amendment allegations would not lie under the Fourteenth Amendment, opined that a complaint possibly could be made if he asserted a violation of a specific provision of the Bill of Rights (the Fourth

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[2] Due process violations are regulated to the states and do not rise to the level of constitutional tort. Without his First Amendment retaliation claim, Johnson was in the wrong courthouse.

Amendment) but, first, Johnson would have to prove that he was innocent of all charges. Johnson, who had already been found guilty, could obviously not do that.

Simply put, the Texas court misread *Johnson* to mean that governments can engage in retaliatory criminal or civil prosecutions for the exercise of First Amendment freedoms. As a result, the Texas court misstated constitutional law.

The point of the *Johnson* case is that due process considerations (not to be confused with substantive due process claims which are federal issues) like the manufacturing of evidence claimed by Johnson are due process complaints which the states must enforce. Thus, *Johnson* is in agreement with *Paratt v. Taylor*, 451 U.S. 527 (1981) because it recognizes the principles of federalism and the traditional sovereign prerogative of a state to define for itself the tort rules governing its own conduct. Recognizing that Johnson only had a state law claim, the *Johnson* court correctly opined that he would have to demonstrate the elements of the state common law tort of malicious prosecution and, importantly, demonstrate that he was not guilty of the charges brought against him.

Clearly, *Johnson* is distinguished from this First Amendment retaliation case and its misuse by the Texas court to create a new constitutional theory

which allows retaliation by government should not be allowed to stand.

Censorship and Sanctions

In this case, motive of the defendants has never been a question; the school board hired a new, more aggressive, legal team to file suit after suit against Finlan in retaliation for his speech and in an attempt to force a settlement of Finlan's original civil rights case. One board member, Dan Peavy, testified that "[T]his was done to burden Finlan with new lawsuits and force [him] to settle the Civil Rights Suit on our terms." The suits filed against Finlan in this particular case and the many others that were filed against him materially damaged Finlan's career path as a home builder[3] and 'chilled' his speech. Under this new Texas rule, Finlan can no longer even entertain the idea of participating in a public debate for fear that he would have to defend yet another government financed civil suit.

The theory of "self government"[4] which was advanced so many years ago by this Court has been,

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[3] As Mr. Eichelbaum, the school district's attorney, told the board about government lawsuits: "What that means to [Finlan] is, [he] can't get loans . . . pending that lawsuit. [His] credit line is shot." App., pg.50-51.

[4] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

to a considerable degree, chilled or destroyed in North Texas. As word spreads of the decision below, more citizens will think twice about the exercise of First Amendment freedoms and, more often than not, will engage in self-censorship rather than incur the economic sanction of having to defend a retaliatory government suit.

The First Amendment rights at issue in this case, the right of speech and the right to petition government for redress of wrongs, explain the central meaning of the First Amendment and the essence of self government.

The First Amendment assures the American people of the right to obtain the necessary knowledge to govern themselves. And, of course, DISD public officials feared that Finlan's request for campaign information would lead, perhaps, to the revelation of irregularities. But the foregoing fact scenario demonstrates that Finlan was singled out for retaliatory lawsuits for a more overriding purpose - to overwhelm Finlan with the expense of defending costly retaliatory suits demanding huge amounts of attorneys' fees and damages designed to make him drop and or settle his existing suit against the government.

These acts and their malicious and unconstitutional nature step over the line of

Finlan's First Amendment freedoms and extend into his substantive Fourteenth Amendment right to be free of government oppression, intimidation, and intentional harm. *See Wolff v. McDonnell*, 418 U.S. 539 (1974). Singling Finlan out for such an expensive government assault, the government actors abandoned their traditional discretionary and legislative capacities to do Finlan harm to force settlement of his earlier suit. Substantive Fourteenth Amendment rights are implicated where there is an "abuse"[5] or misuse of power, or when the government defendants' conduct was "severe,"[6] "reprehensible,"[7] or "egregious."[8] Substantive Fourteenth Amendment rights are intended to prevent the type of abuse of power by

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[5] *See, e.g., Willaims v. Kelly*, 624 F.2d 695, 697 (5th Cir. 1980), cert. denied 451 U.S. 1019 (1981).

[6] *See, Tefft v. Seward,* 689 F.2d 637, 639n.1 (6th Cir. 1982).

[7] *See, e.g., Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345 (9th Cir. 1981) aff'd on other grounds, 103 S.Ct. 1483 (1983).

[8] *See, e.g., Hull v. City of Duncanville*, 678 F.2d 582, 584 (5th Cir. 1982).

government officials and oppression demonstrated in this case. *See Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992); *Rochin v. California,* 342 U.S. 165 (1952); *Daniels v. Williams,* 474 U.S. 327 (1986).

Finlan's right to petition government is intimately connected, both in origin and in purpose, with his right of free speech and is a right which is clearly and emphatically established in constitutional jurisprudence. *See California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972); *United Mine Workers v. Illinois State Bar Ass'n,* 389 U.S. 217 (1967); *Gitlow v. New York,* 268 U.S. 652 (1925); *United States v. Cruikshank,* 92 U.S. 542 (1875); *McDonald v. Smith,* 472 U.S. 479 (1985); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

Additionally, numerous cases have held that the right of free speech prohibits government suits designed to retaliate for the exercise of this freedom. *See Johnson City v. Cowles Communications, Inc.*, (1972) 477, S.W.2d 750; *State v. Time, Inc.* (LaApp. 1971) 249 So.2d 328; *City of Albany v. Meyers*, (1929) 99 Ca.App. 651, 279 P. 213; *City of Chicago v. Tribune Co.*, (1929) 307 Ill. 595, 139 N.E. 86 quoted with approval in *New York Times Co. v.*

Sullivan, 376 U.S. 254 (1964).

It is, or should be, settled that direct retaliation by the state for having exercised First Amendment freedoms in the past is proscribed by the Constitution and is actionable pursuant to 42 U.S.C.A. §1983. *See Mount Healthy City School District v. Doyle*, 429 U.S. 274 (1977); *Elrod v. Burns*, 427 U.S. 347 (1976); *Cohen v. California*, 403 U.S. 15 (1971).

The Fifth Circuit, as well as others, make it clear that state actors may not take retaliatory action of *any kind* against an individual designed either to punish him for having exercised his constitutional rights or to intimidate or chill his exercise of that right in the future. *See Lamar v. Steele*, 693 F.2d 559, 562 (5th Cir. 1982), *cert. denied* 464 U.S. 821 (1983); *Rolf v. City of San Antonio*, 77 F.3d 823 (5th Cir. 1996)(condemnation suit in retaliation for speech); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310 (9th Cir. 1989); *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. [B] 1981); *Harrison v. Springdale Water & Sewer Commission*, 780 F.2d 1422 (8th Cir. 1986)(retaliatory lawsuit); *Greenwich Citizens Committee v. Counties of Warren*, 77 F.3d 26 (2nd Cir. 1996); *Garland v. Polley*, 594 F.2d 1220 (8th Cir. 1979); *Hall v. Sutton*, 755 F.2d 786 (11th Cir. 1985); *Matzker v. Herr*, 748 F.2d 1141

(7th Cir. 1984); *Milhouse v. Carson*, 652 F.2d 371(3rd Cir. 1981); *Bradley v. Pittsburgh Bd. of Education*, 910 F.2d 1172 (3rd Cir.1990)(retaliation for filing of lawsuit); *White v. Napoleon*, 897 F.2d 103 (3rd Cir. 1990); *Anderson v. Davila*, 125 F.3d 148 (3rd Cir. 1997)(retaliation for filing lawsuit will support §1983 claim); *Silver v. Cormier*, 529 F.2d 161 (10th Cir. 1976); *Hudspeth v. Figgins*, 58 F.2d 1345 (4th Cir. 1978), *cert. denied* 441 U.S. 913 (1979); *Cate v. Oldham*, 707 F.2d 1176 (11th Cir. 1983). *See also City of Long Beach v. Bozek*, 645 P.2d 137 (CAL 1982), *cert. granted* 103 S.Ct. 712 (1983); *Miami Trace Local School District v. Martin*, 217 N.E. 2d 712 (1966)(suit instituted by a board of education against taxpayer and his attorneys who had previously instituted suit against board to enjoin proposed sale of bonds).

"[T]he First Amendment protects the right of an individual to speak freely . . . and to petition his government for redress . . . The government is prohibited from infringing upon these guarantees either by a general prohibition against certain forms of advocacy . . or by imposing sanctions for the expression of particular views it opposes." *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979).

The Texas opinion is an oxymoron because it

recognizes the "well established" First Amendmentright of petition, citing *Roland v. Shapiro*, 708 F.2d 967, 971-72 (5th Cir. 1983) and *Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979), but then goes on to state that Finlan has no right to be free of retaliation when he exercises such rights. This can not be. The First Amendment would not be a protected right if government is free to retaliate. The Texas opinion misstates federal law.

Additionally, the Texas opinion, attempting to bolster its position that retaliation was permissible, wrongly interpreted Finlan's right of petition as being no more than facilitative in nature. The Texas opinion, relying on *Foster v. City of Lake Jackson*, 28 F.3d 425 (5th Cir. 1994), opined that the right of petition only meant that an individual could get to the courthouse, pay his filing fees, and file his suit. It went on to state that, since Finlan has not shown that "his ability to file suit was in any way delayed or blocked altogether," and that, since "he has been a frequent party to litigation against DISD Trustees," "Finlan's constitutional right to access to the courts was not violated."

The Texas opinion misreads *Foster* and results in a misstatement of federal law. *Foster* was a case involving parents who had previously settled a wrongful death action with the city.

They sued alleging that city officials conspired to deny them access to the courts by concealing evidence during discovery (discovery abuse), thus, causing them to settle the case for less. The city alleged that, at the time of the alleged conduct (1985-1988), the right of access to the courts did "not encompass a right to proceed free of discovery abuse by a governmental entity. . " *Foster,* 28 F.3d at 429. The court in *Foster*, dealing with the narrow issue of discovery abuse, stated that the right of access to the courts (between 1985 and 1988) is only implicated "where the ability to file suit was delayed, or blocked altogether." *Id.* at 430. Overlooking pertinent Fifth Circuit case law that established Finlan's right to be free of retaliation[3], the Texas court severely restricted the right of petition and misstated federal law.

---

[3] *See Hale v. Townley*, 19 F.3d 1068 (5th Cir.1994), *modified*, (5th Cir. May 13, 1994)("[T]he right of access to courts, free of retaliation, is a right recognized under, and protected by, the First Amendment."); *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989), *cert. denied*, 496 U.S. 924 (1990)(if state officials in some way retaliate against an individual for seeking redress through the courts, they have violated that person's right of access to the courts.).

Foster, like *Johnson* above, is another Fourteenth Amendment due process case which deals with the fairness of procedure (due process) not substantive rights found in the Constitutional Amendments. Due process violations, like the discovery abuse described in *Foster*, do not rise to the level of constitutional tort. The Fourteenth Amendment enforces observance of due process on the states and, indeed, state laws provide recourse for violation of courtroom procedure.

Thus, *Foster* is distinguishable from the case at bar and the Texas opinion misstates federal law and wrongly diminishes the right of petition for all Texans.

Still relying on its misunderstanding of *Foster*, the Texas opinion goes on to opine that Finlan, by filing his case under section 1983, actually extinguished his own cause of action. This means that in Texas where the complaint is that government filed a retaliatory lawsuit against a citizen for the exercise of free speech rights, particularly the right of petition, the plaintiff must always be dismissed because, according to the court below, his own suit proves there is no violation of the right of petition.

The Fifth Circuit has previously dealt with the anomaly expressed in the Texas opinion in *Lamar v. Steele* 693 F.2d at 562 (5th Cir. 1982). The Fifth Circuit states:

"[T]he (plaintiff's) reaction to the threats (of retaliation) is . . immaterial. It is not necessary to show that the (plaintiff) succumbed to the threats as a predicate for securing §1983 relief. The Contrary rule would result in the anomaly of protecting only those individuals who remain out of court."

Thus, the new rule set forth by the Texas opinion misstates federal law where it takes the stance that Finlan can not file a section 1983 case complaining about violation of his right of petition because the mere filing of his case in the courthouse would extinguish his own claim.

By permitting retaliation for the exercise of First Amendment freedoms, the new Texas rule suppresses such rights by granting unconstitutional power to local government.

In *New York Times*, supra., this Court opposed compelling the critic of official conduct to guarantee the truth of his assertions on pain of libel judgments in virtually unlimited amounts. The principle recognized by the Court is that, under the American system, the power is in the people over the government, and not in the government over the people. This is the foundation upon which self-government is laid.

For millions of Texans, the Texas opinion has laid waste to this fundamental American principle and now the prospect and fear of damage awards from

retaliatory government suits makes possible what Texas governments were previously unable to command.

Although Finlan was the target of many more retaliatory suits than the ones discussed here, this case and the original $280 million suit against Finlan for defamation of government demonstrate how quickly the power to sue in the hands of corrupt government officials can get out of hand. The fear of civil suits is their great power to punish financially. Civil suits by government can be filed, dropped, re-filed, and appealed, entangling the government's target in a web of debilitating and costly litigation.

The government's additional punishment is found in the disclosure the target must give to his banker once he becomes a defendant of a government suit asking for damages or attorneys' fees. That disclosure, required by federal law, completely undermines the target's financial standing and he soon finds that he must not only bear the cost of defense of the retaliatory government suit, but must bear the mutilation of his credit reputation. That situation for Finlan was crippling - his career as a small home builder is but a memory.

The cost to society accumulates as more citizens learn of the Texas rule allowing governments to retaliate. In such an atmosphere of fear and

timidity imposed by the Texas opinion, self-censorship will dampen the ardor of all but the most resolute.

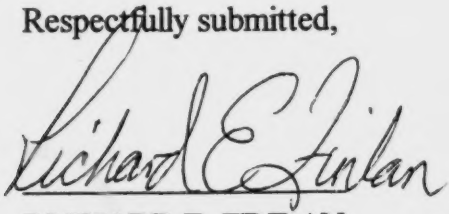
Retaliatory lawsuits against those who exercise First Amendment freedoms have reached epidemic proportions across the nation. California and New York have passed legislation designed to quell abuse of these freedoms by retaliatory suits.

Finlan, who has been subjected to government suits based on his exercise of First Amendment rights has been sued for nearly one third billion dollars. But such huge claims of damages or attorneys' fees are not necessary to dissuade average citizens from exercising their rights. Just the prospect of being sued and having to pay a lawyer a $5,000 retainer to defend a government suit is all that is necessary to convince most that they want no part of free government-critical speech in the future. This Court will never hear about most of these assaults on First Amendment freedoms because, once the government suit is filed or threatened, most will agree to stop their First Amendment activities in exchange for a non-suit of the government case.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,



RICHARD E. FINLAN
1131 Clermont Avenue
Dallas, Texas 75223
(214) 324-7557
Petitioner

(2)

Supreme Court, U.S.
FILED

01940 MAY 21 2001

OFFICE OF THE CLERK

No. __ - _____

In The
Supreme Court of the United States

RICHARD E. FINLAN,

Petitioner,

vs.

DALLAS INDEPENDENT SCHOOL DISTRICT, SANDY KRESS, CHAD WOOLERY, HOLLIS BRASHEAR, WILLIAM KEEVER, LYNDA MCDOW, KATHLEEN LEOS, YVONNE EWELL, LARRY FRIEDMAN, ALAN RICH, FRIEDMAN & ASSOCIATES, P.C., DENNIS EICHELBAUM, and SCHWARTZ & EICHELBAUM, P.C.

Respondents,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

APPENDIX

RICHARD E. FINLAN
1131 Clermont Avenue
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Petitioner

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AFFIRMED IN PART; REVERSED and RENDERED IN PART; REVERSED and REMANDED IN PART; Opinion Filed August 28, 2000

S

In The

Court of Appeals

Fifth District of Texas at Dallas

.....

No. 05-97-00734-CV

.....

DALLAS INDEPENDENT SCHOOL DISTRICT, SANDY KRESS,
CHAD WOOLERY, HOLLIS BRASHEAR, WILLIAM KEEVER,
LYNDA M C DOW, KATHLEEN LEOS, DAN PEAVY, YVONNE EWELL,
JOSE PLATA, LARRY FRIEDMAN, ALAN RICH,
DAVID REESE, FRIEDMAN & ASSOCIATES, P.C.,
DENNIS EICHELBAUM, and SCHWARTZ & EICHELBAUM, P.C.,
Appellants/Cross-Appellees

V.

RICHARD E. FINLAN, ED GRANT, and RONALD HINDS,
Appellees/Cross-Appellants

V.

LAWRENCE FRIEDMAN, ALAN RICH, and FRIEDMAN & ASSOCIATES, P.C.
Appellees

.....

On Appeal from the 160th Judicial District Court

Dallas County, Texas

Trial Court Cause No. 97-00392-H [sic]

OPINION ON REHEARING

Before Chief Justice Thomas and Justices Whittington and Stewart FN:1

Opinion By Justice Stewart

We partially grant Richard E. Finlan's and Ed Grant's motions for rehearing, which were filed on June 9, 2000. We withdraw our prior opinion and vacate our prior judgment, both dated May 25, 2000. The following is now the opinion of the Court.

This appeal arises from a suit for damages brought by the Dallas Independent School District (DISD), alleging civil conspiracy against four defendants: Richard Finlan, Don Venable, Ronald Hinds, and Ed Grant. Finlan filed a counterclaim, alleging in two separate counts that his civil rights had been violated by DISD, DISD officials, and DISD attorneys; that he was entitled to a writ of mandamus to view the backup documents to campaign finance reports certain named DISD trustees filed pursuant to the Texas Election Code; and that he had been defamed by some of the DISD attorneys. Hinds also filed a claim alleging that some of the DISD attorneys defamed him as well and conspired to defame him. All of the parties except Venable moved for summary judgment.

The trial court granted summary judgment dismissing DISD's civil conspiracy claims, granted Finlan's summary judgment motion seeking the campaign finance report backup documents, granted DISD's, DISD officials' and DISD attorneys' summary judgment motions against Finlan's civil rights claims, and granted DISD attorneys' motion for summary judgment against both Finlan's and Hinds' defamation claims. The trial court did not supply the ground or grounds relied on for any of its rulings.

We affirm in part, reverse and render in part, and

reverse and remand in part. In our analysis, we use the following terms to refer to the various parties:

DISD Dallas Independent School District;

DISD Trustees All DISD trustees involved in this case as Appellants/Cross-Appellees because of their affiliation with DISD as former or current DISD trustees (Sandy Kress, Hollis Brashear, William Keever, Lynda McDow, Kathleen Leos, Dan Peavy, Yvonne Ewell, and Jose Plata);

Friedman & Associates All parties affiliated with Friedman & Associates (Friedman & Associates, P.C., Larry Friedman, Alan Rich, and David Reese);

DISD Attorneys All attorneys or law firms that are parties to this action on the basis of their current or former representation of DISD Parties (Friedman & Associates, P.C., Larry Friedman, Alan Rich, David Reese, Schwartz & Eichelbaum, P.C., and Dennis Eichelbaum);

DISD Parties All parties affiliated with the DISD (DISD, DISD Trustees, Superintendent Chad Woolery, and DISD attorneys).

STANDARD OF REVIEW ON SUMMARY JUDGMENT

The standards for reviewing summary judgment are well settled. See Nixon v. Mr. Property Management Co. , 690 S.W.2d 546, 548-49 (Tex. 1985). The standards are:1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. 2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true. 3. Every reasonable inference must be indulged in

favor of the non-movant and any doubts resolved in its favor. *Id.* The provisions of rule 166a, the summary judgment rule, apply to both defendants and plaintiffs who move for summary judgment. *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970). A defendant who conclusively negates at least one essential element of each theory pleaded by the plaintiff is entitled to summary judgment. Wornick Co. v. Casas , 856 S.W.2d 732, 733 (Tex. 1993); International Union United Auto. Aerospace & Agric. Implement Workers of America Local 119 v. Johnson Controls, Inc. , 813 S.W.2d 558, 563 (Tex. App._Dallas 1991, writ denied). A defendant can also prevail by pleading and conclusively establishing every element of an affirmative defense. Swilley v. Hughes , 488 S.W.2d 64, 67 (Tex. 1972); Johnson Controls , 813 S.W.2d at 563; Deer Creek Ltd. v. North Am. Mortgage Co. , 792 S.W.2d 198, 200 (Tex. App._Dallas 1990, no writ).

When the plaintiff and defendant both move for summary judgment, each party bears the burden of establishing that it is entitled to judgment as a matter of law. *Guynes v. Galveston County*, 861 S.W.2d 861, 862 (Tex. 1993); *American States Ins. Co. of Tex. v. Arnold*, 930 S.W.2d 196, 200 (Tex. App._Dallas 1996, writ denied). When both sides file motions for summary judgment and one is granted and one is denied, we review all questions presented. *Jones v. Strauss*, 745 S.W.2d 898, 900 (Tex. 1988); *Nationwide Property & Cas. Ins. Co. v. McFarland*, 887 S.W.2d 487, 490 (Tex. App._Dallas 1994, writ denied). When the trial court's order granting summary judgment does not specify the ground or grounds relied on for its ruling, we affirm the judgment if any theory advanced has merit. *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380

(Tex. 1993); *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989). To prevail, the appellant must show each of the independent arguments alleged in the motion is insufficient to support summary judgment. *Holloway v. Starnes*, 840 S.W.2d 14, 18 (Tex. App._Dallas 1992, writ denied); *Insurance Co. of N. Am. v. Security Ins. Co.*, 790 S.W.2d 407, 410 (Tex. App._Houston [1st Dist.] 1990, no writ).

DISD'S and DISD TRUSTEES' POINTS OF ERROR

The DISD Trustees contend the trial court erred by granting a common law writ of mandamus ordering certain DISD trustees to provide Finlan with backup documents to their campaign finance reports. DISD contends the trial court erred by (1) dismissing with prejudice DISD's conspiracy claims against Hinds, Finlan, and Grant; (2) considering the summary judgment evidence tendered by Hinds, Finlan, and Grant on DISD's conspiracy claims; and (3) prohibiting necessary discovery before granting summary judgment. DISD's and the DISD Trustees' first point of error generally asserts the trial court erred in granting summary judgment. No specific error is stated. Accordingly, we address each specific point of error below.

1. Backup Financial Records For DISD Trustees

(DISD Trustees' Points of Error Nos. 2 - 5) In their second point of error, the DISD Trustees contend they need not produce the record of the information upon which their campaign finance reports are based because these backup documents are not "election records" under the Texas Election Code. In their third point, they contend a common law writ of mandamus is not available to obtain these backup documents. In their fourth point, they assert Finlan did not meet the legal requirements to obtain a

common law writ of mandamus. In their fifth point, they argue judgment should be rendered in their favor. For the reasons set forth below, we hold backup documents to campaign finance reports are not "election records" subject to disclosure, and we render judgment for the DISD Trustees on this issue.

a. Background

The DISD Trustees, as officeholders, must maintain a record comprised of backup information for the campaign finance reports which they are required to file pursuant to the Texas Election Code. FN:2 After DISD filed this suit, Finlan added the trustees to the case and filed an action against them for a "common law writ of mandamus," seeking to force the disclosure, to Finlan, of these backup documents. Finlan filed a motion for summary judgment seeking such disclosure, arguing that the backup documents constituted "election records" as that term is used under the public information provision of the code.

b. Applicable Law

i. Mandamus Standard of Review.

A common law mandamus action has three requisites: a legal duty to perform a nondiscretionary act, a demand for performance, and a refusal. *Stoner v. Massey*, 586 S.W.2d 843, 846 (Tex. 1979) (orig. proceeding); *Dallas County Appraisal Dist. v. Funds Recovery, Inc.*, 887 S.W.2d 465, 467 n.5 (Tex. App._Dallas 1994, orig. proceeding [leave denied]); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 413 (Tex. App._Austin 1992, orig. proceeding). A mandamus will issue only to correct a clear abuse of discretion for which there is no adequate remedy by appeal. *See National Med. Enters., Inc. v. Godbey*, 924 S.W.2d 123, 128 (Tex. 1996) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992)

(orig. proceeding). A trial court clearly abuses its discretion if "it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Walker*, 827 S.W.2d at 839 (quoting *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding)). "A trial court has no 'discretion' in determining what the law is or applying the law to the facts." *Walker*, 827 S.W.2d at 840. The trial court abuses its discretion when it does not analyze or apply the law correctly. *Id.* We defer to the district court's resolution of fact issues, unless it is clear from the record that only one decision could have been reached. *GTE Communications Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993) (orig. proceeding) (citing *Walker*, 827 S.W.2d at 839-40).

ii. Texas Election Code

Candidates and officeholders are required to file sworn campaign finance reports of their campaign contributions, loans, and expenditures. Tex. Elec. Code Ann. §§ 254.031(a), 254.061, 254.091 (Vernon Supp. 2000). They also are required to maintain a record containing the information necessary for filing these reports, and they must preserve this record for at least two years beginning on the filing deadline for the report containing that information. Tex. Elec. Code Ann. §§ 254.001(a), (c), and (d) (Vernon Supp. 2000). Section 254.040 requires each authority with whom reports are filed to preserve them for at least two years after the filing date. Tex. Elec. Code Ann. § 254.040(a) (Vernon Supp. 2000). The code also provides for public inspection of filed reports, but it does not have any similar provision about the record of backup information from which the reports are prepared. *See* Tex. Elec. Code Ann. § 254.040 (b) (Vernon Supp. 2000). Another provision of the code provides that all "election records" are public

information, unless otherwise provided by the code or chapter 552 of the Texas Government Code. Tex. Elec. Code Ann. § 1.012(c) (Vernon Supp. 2000).

c. Application of Law to Facts

Finlan contends that the record each trustee must maintain to prepare the required reports is public information. He relies on the preservation requirements of section 254, above, and the provisions of section 1.012 of the code stating that ". . . an election record that is public information shall be made available to the public during regular business hours of the record's custodian." *Id.* at § 1.012(a). Because section 254.001(c) of the code provides trustees as candidates or officeholders must preserve a record of "information" used to prepare required reports, Finlan argues this record is an "election record that is public information," and that a trustee is the record's "custodian" under section 1.012(a).

Although the code defines twenty-four specialized terms, "election records" is not defined. *See* Tex. Elec. Code Ann. § 1.005 (Vernon 1986 and Supp. 2000). The meaning of a statutory term, if not specifically defined, must be ascertained by examining the language and intent of the legislature. *Dallas Morning News Co. v. Board of Trustees of Dallas Indep. Sch. Dist.*, 861 S.W.2d 532, 535 (Tex. App._Dallas 1993, writ denied); *Estate of Padilla v. Charter Oaks Fire Ins. Co.*, 843 S.W.2d 196, 198 (Tex. App._Dallas 1992, writ denied). Importantly, ascertaining the term's meaning is determined primarily by how that term is used throughout the act as a whole. *Dallas Morning News Co.*, 861 S.W.2d at 535; *Estate of Padilla*, 843 S.W.2d at 198. Statutory terms should be interpreted consistently in every part

of an act. *Dallas Morning News Co.*, 861 S.W.2d at 535; *Estate of Padilla*, 843 S.W.2d at 198.

Section 1.012 provides that some election records are "public information," but does not itself define the term "election record." *See* Tex. Elec. Code Ann. § 1.012 (Vernon Supp. 2000). However, section 1.013 divides documents that must be retained under the code into various categories:

> After expiration of the prescribed period for preserving voted ballots, election returns, other election records, or other records that are preserved under this code, the records may be destroyed or otherwise disposed of . . .Tex. Elec. Code Ann. § 1.013 (Vernon 1986).

Section 1.013 creates two general categories of documents: (1) "election records" and, (2) "other records that are preserved" under the code. *Id.* As for the first category, the term "other election records" is to be interpreted as covering records of the same kind or class as the "voted ballots" and "election returns" specifically named. *See Villarreal v. State*, 810 S.W.2d 419, 422 (Tex. App._Dallas 1991, writ denied).

Section 1.013 lists voted ballots and election returns as types of election records, but it also evidences not all records under the code are election records. Tex. Elec. Code Ann. § 1.013 (Vernon Supp. 2000). "Election records" also include ballot boxes (containing voted ballots), tally sheets, absentee ballots, applications for absentee ballots in person and by mail, signature rosters for election day voting, and poll lists. *Garcia v. Avila*, 597 S.W.2d 400, 405 (Tex. Civ. App._San Antonio 1980, writ dism'd). These items, and items like them, also constitute "precinct election records," as defined and used in chapter 66 of the code. In addition, section 273.003 lists election

returns, voted ballots, and the signature roster as specific types of election records. Tex. Elec. Code Ann. § 273.003 (Vernon 1986). Based on the uses of the term "election records" and the examples listed within the code, we conclude "election records" are those which memorialize the actual election and the actual conduct of the election.

The second category of documents listed in section 1.013, "other records that are preserved under this code," includes both the record of information to support campaign finance reports and the reports themselves, which must be preserved, respectively, by the trustee and the authority with whom the report is filed. Tex. Elec. Code Ann. §§ 254.001(d), 254.040 (a) (Vernon Supp. 2000). However, only the campaign finance report is "required to be filed" under chapter 15, and it is the only record of the two for which the code provides public inspection. *Id.* § 254.040(b). If the legislature had intended this record of information under section 254.001 to be available to the public, it could easily have provided for that as it did for the campaign finance reports. Every word excluded from a statute is presumed to have been excluded for a purpose. *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981). Thus, we hold that the record of information a candidate or officeholder is required to maintain under section 254.001 is not "an election record" subject to public inspection. *Accord* Op. Tex. Ethics Comm'n No. 308 (1996) ("[N]othing in title 15 of the Election Code . . . makes . . . 'backup records' public records.") In their fourth point of error, the DISD Trustees contend Finlan has no clear right to obtain the backup documents he seeks; therefore, the trial court improperly granted a "common law writ of mandamus." We agree the trial court had no legal

basis for granting Finlan access to the backup documents because these records of information are not "election records" subject to public inspection. *See Walker*, 827 S.W.2d at 839. Accordingly, the trial court clearly abused its discretion. *See id.* We sustain the DISD Trustees' fourth point of error to the extent it contends there is no legal basis for the trial court's decision.

The DISD Trustees' fifth point of error contends judgment should be rendered in favor of the individual trustees that they need not disclose their backup documents to Finlan. We agree because Finlan is not legally entitled to this information. *See Commissioners Court of Titus County v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997). We sustain the fifth point of error and render judgment that the DISD Trustees need not provide Finlan with the backup documents to support their finance reports.

Because of our disposition of points of error two, four, and five, we need not address the Trustees' third point of error, which contends the common law writ of mandamus has been supplanted by the code in this case. *See* Tex. R. App. P. 47.1.

2. DISD's Conspiracy Claims Against Finlan, Grant, and Hinds (DISD Points of Error 6 - 9)

DISD alleged a conspiracy among Finlan, Venable, Grant (former trustee), and Hinds (attorney) (the "Conspiracy Defendants"). In its sixth point, DISD contends Finlan, Hinds, and Grant "failed to conclusively disprove the existence of a conspiracy . . . ." FN:3 In its seventh point, DISD contends the trial court erroneously granted summary judgment because the trial court should have granted, at most, special exceptions or dismissed its conspiracy claim without prejudice. In its eighth point, DISD contends the trial

court erred in granting summary judgment because it was not allowed to conduct necessary discovery on its conspiracy claim. In its ninth point, DISD argues the trial judge erred in overruling its objections to the summary judgment affidavits filed by the conspiracy defendants Finlan, Grant, and Hinds, contending the affidavits are conclusory and should not be admitted on the issues of intent and motive.

a. Background

In September 1992, Finlan and Venable wrote a letter to DISD's investment bankers, Goldman, Sachs & Company, apprising them of their own pending litigation against DISD under the Texas Open Records Act seeking production of records pertaining to the issuance of bonds and usage of bond fund proceeds. Grant was a member of the school board at that time.

In October 1992, DISD sued Finlan and Venable seeking over $270 million in damages for tortious interference with the relationship and contract between the board and Goldman, Sachs & Company and for defamation of DISD. In response to the "tortious interference suit," Finlan and Venable filed civil rights counterclaims against DISD and its individual board members. Finlan, proceeding pro se, filed a plea in bar that the trial court granted, dismissing DISD's claims as to him. DISD then non-suited its action against all parties, but the counterclaim remained and part of that suit was abated.

In 1994, Finlan and Venable filed an action in the 162nd District Court against DISD, its superintendent, the individual trustees (including Grant), and Schwartz & Eichelbaum, DISD's

attorneys. They alleged the filing of the tortious interference suit violated their civil rights under section1983. FN:4 Venable was represented by Hinds, but Finlan again proceeded pro se. In that suit, Grant allegedly approached Hinds and stated he wanted to confess judgment in the 162nd civil rights suit and file an action for legal malpractice against Dennis Eichelbaum, Leonard Schwartz, and the firm of Schwartz & Eichelbaum, P.C., who allegedly had advised the trustees in 1992 to file the tortious interference suit against Finlan and Venable. Hinds subsequently represented Grant as a plaintiff on his cross-claims, and DISD argues he also represented Grant as a defendant to the civil rights claim.

In the 162nd civil rights suit, Finlan filed a motion for summary judgment against Grant. Finlan and Grant later presented an agreed judgment in favor of Finlan for $300,000 to the judge who then signed it. That judgment has never been severed from the main case and that case is still pending. The events in that case are the basis for DISD's civil conspiracy claim now before the court.

b. Applicable Law

i. Fraud

The elements of a common law fraud claim are: (1) a material representation; (2) that was false; (3) that the speaker knew was false at the time it was made; (4) that was made with the intention of being acted upon; (5) that the party acted in reliance; and (6) that injury was suffered. *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983).

ii. Civil Conspiracy

An actionable civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by

unlawful means. *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995); *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983); *Futerfas v. Park Towers*, 707 S.W.2d 149, 156 (Tex. App._Dallas 1986, writ ref'd n.r.e.). The essential elements are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. *Massey*, 652 S.W.2d at 934; *Futerfas*, 707 S.W.2d at 156.

c. Application of Law to Facts

The essence of DISD's conspiracy claim is that the Conspiracy Defendants conspired to obtain a judgment against DISD or the DISD Trustees through the 162nd District Court civil rights suit, which DISD alleges is fraudulent. DISD's live pleading alleged a civil conspiracy against Venable, Finlan, Grant, and Hinds, in part, as follows:

> Venable and Finlan would file suit against DISD trustees [including Grant] for supposedly violating Venable's and Finlan's "civil rights". . . . Hinds would represent Venable in the Civil Rights Suit, *and* Hinds would represent Grant (whom he [Hinds] sued in the Civil Rights Suit on behalf of Venable). On information and belief, Grant was recruited into this conspiracy by Venable and Finlan by use of threats that they would gain access to financial records relating to Grant's school board campaign, which records would embarrass Grant and even expose him to civil or criminal liability. . . .
>
> * * *
>
> The DISD has an escrow account with the Texas Association of School Boards, Inc.

("TASB") out of which, under certain circumstances, judgments against the DISD and its Trustees may be satisfied. It is this account which is the object of the conspirators' desires. The conspirators' object was or is to obtain consent judgments against Grant, and collect those judgments from the TASB escrow fund.

The question in the trial court and on appeal is *not* whether the summary judgment proof raises fact issues with reference to the essential elements of a plaintiff's cause of action, but whether the summary judgment proof *establishes as a matter of law* that there is no genuine issue of fact as to one or more of the essential elements of the plaintiff's cause of action. *Gibbs*, 450 S.W.2d at 828. Moreover, the burden does not shift to the plaintiff to present evidence creating a fact issue until the defendant produces evidence entitling it to summary judgment as a matter of law. *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). If a movant's evidence only raises a fact issue, the non-movant need not offer contradictory proof. *Swilley*, 488 S.W.2d at 67. Summary judgments must stand on their own merits, and the non-movants failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979); *Futerfas*, 707 S.W.2d at 155. With these standards in mind, we analyze the evidence proffered by Finlan, Grant, and Hinds to determine whether they disproved DISD's conspiracy claim as a matter of law.

i. Summary Judgment for Finlan

Finlan's February 28, 1996 motion for partial summary judgment attacked DISD's RICO and civil conspiracy claims. On April 17, 1996, DISD

nonsuited its RICO claims in its third amended petition. On April 22, 1996 , Finlan filed "Finlan's Motion for Partial Summary Judgment - DISD's Civil Conspiracy Claim and Motion for Sanctions."

A substituted or amended motion for summary judgment supercedes and supplants the previous motion, which may no longer be considered. *Frias v. Atlantic Richfield Co.*, 999 S.W.2d 97, 102 (Tex. App._Houston [14th Dist.] 1999, pet. denied); *State v. Seventeen Thousand & No/100 Dollars U.S. Currency*, 809 S.W.2d 637, 639 (Tex. App._Corpus Christi 1991, no writ). In Finlan's brief, he states his only live summary judgment motion was his motion filed on April 22, 1996. We agree. Therefore, when determining whether Finlan properly obtained summary judgment, we do not consider his motions filed prior to April 22, 1996.

Finlan moved for summary judgment on the ground that "DISD's instant civil conspiracy suit is, in reality, a malicious prosecution suit." A defendant moving for summary judgment is required to meet the plaintiff's causes of action as pleaded and to demonstrate that the plaintiff cannot prevail. *Cook v. Brundidge, Fountain, Elliott & Churchill*, 533 S.W.2d 751, 759 (Tex. 1976); *Rogers v. R.J. Reynolds Tobacco Co.*, 761 S.W.2d 788, 795 (Tex. App._Beaumont 1988, writ denied). DISD's third amended original petition pleaded civil conspiracy, not malicious prosecution of a civil suit. The elements of a civil conspiracy claim are different from the elements of malicious prosecution of a civil claim, and the causes of action are different. *Compare Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 207 (Tex. 1996) (stating the elements of malicious prosecution of a civil claim), *with Massey*, 652 S.W.2d at 934 (stating the elements of civil conspiracy). DISD's

claims, as stated in its live petition, are broader than Finlan's characterization of the claims.

DISD placed evidence in the record in response to Finlan's motion. Finlan testified, by deposition, about the events leading to the entry of the "Agreed Order of Judgment Against Ed Grant" in the case in the 162nd District Court. Finlan first approached Grant about conceding judgment in the ~~162nd case~~ sometime in the late summer of 1994. Finlan, Venable, and Grant met at a restaurant for lunch, and all three participated in the discussion. Finlan testified "[t]he discussion turned to whether or not he would supply us _ whether or not Mr. Grant would tell the truth in this cause." Finlan could not remember exactly what happened after the restaurant meeting, but he believed there were phone calls back and forth. Finlan testified, "[a]t some point in time, Mr. Grant announced that he wanted to sue his former attorneys, Mr. Eichelbaum and Mr. Schwartz." Grant may have said he wanted to sue his attorneys at the initial meeting at the restaurant. Finlan testified that he educated Grant about the lawsuits during their lunch meeting.

Finlan testified that he did not know whether Hinds prepared Grant's affidavit, which was part of Grant's answer. Hinds signed the certificate of service, which is at the bottom of the final page of the affidavit. Finlan also testified about another affidavit by Grant, which was file stamped October 20, 1994. Finlan interviewed Grant and prepared the affidavit based on the interview. Finlan believes he made one or more revisions that Grant suggested, and Grant ultimately executed the affidavit. Grant also provided Finlan with notes on the events of 1992. Further, Grant testified the amount of the agreed judgment, $300,000, was arrived at through negotiations

between himself and Finlan.

In an affidavit attached to DISD's response to Finlan's motion for summary judgment, Ray Morrison testified he is the general counsel for the Texas Association of School Boards (TASB). On January 27, 1995, Venable called Morrison and asked "how he should make a claim against the property and casualty account" that DISD maintains with TASB. Morrison told Venable the TASB account could only be used to satisfy a judgment against DISD or a DISD official, but could not be used to pay attorney's fees or costs. Venable told Morrison that a DISD official had confessed judgment in favor of Venable. Venable asked Morrison how he could collect against the TASB account, and Morrison told him to contact DISD.

We conclude DISD's evidence raises fact questions concerning the alleged agreement among Finlan, Venable, and Grant to defraud DISD by obtaining consent judgments against DISD regardless of the merits of Finlan's and Venable's civil rights suit in the 162nd District Court and to collect the judgments from the TASB. Hence, Finlan failed to show that he is entitled to judgment as a matter of law. *See Nixon*, 690 S.W.2d at 548-49. Further, as stated above, Finlan's motion for summary judgment failed to meet DISD's case as pleaded. *See* Cook, 533 S.W.2d at 759; *Rogers*, 761 S.W.2d at 795. Accordingly, we reverse the trial court's summary judgment in favor of Finlan.

ii. Summary Judgment for Grant

Grant's sole basis for summary judgment was his joinder in a motion for partial summary judgment filed by Finlan. However, Finlan filed an amended motion which superceded his earlier motion. We

assume, without deciding, that Grant's joinder in Finlan's earlier motion was still a live pleading as to Grant. FN:5

Finlan's motion, joined by Grant, attacked DISD's RICO claims. DISD, however, dismissed its RICO claims in its third amended original petition. Grant's affidavit provides in part:

1. "My name is Ed Grant. I am a resident of Dallas County, Texas, over 18 years of age, have never been convicted of a felony or any crime involving moral turpitude, competent to make this affidavit. The facts stated herein are true and correct and within my personal knowledge.

2. I have never engaged in any illegal or unprivileged act of fraud as defined by 18 USCA1341 and 1343 nor have I ever committed personally or as a member of a conspiracy any illegal or unprivileged act which is indictable under Title 18, USC, that has cause [sic] or is in the process of causing any damage to the business or property of the Dallas Independent School District ("DISD").

3. I have never derived any income from any act which is indictable under Title 18, USC. I have never owned nor have I had any legal or beneficial interest in, directly or indirectly, any interest in [sic] any entity that engages or has engaged in or affects or affected interstate or foreign commerce. I have never operated or controlled, directly or indirectly, any entity that engages or has engaged in or affects or has affected interstate or foreign commerce. I have never operated or controlled, directly or indirectly, any entity that engages or has engaged in or affects or has affected interstate or foreign commerce.

4. I have not committed nor am I in the process of committing any illegal or unprivileged act,

either on my own or in concert with any other person or persons, that has caused or is in the process of causing any legally cognizable damages to the DISD.

5. I have not damaged nor am I in the process of damaging the business or property of the DISD in any legally cognizable fashion by means of any illegal or unprivileged act, past or present, either on my own or in concert with any other person or persons.

Further affiant sayeth not."

We conclude that Grant's affidavit is insufficient to prove he is entitled to summary judgment because: (1) the affidavit is merely a composite of legal conclusions and opinions which are incompetent summary judgment evidence. *See Green v. Unauthorized Practice of Law Comm.*, 883 S.W.2d 293, 297 (Tex. App._Dallas 1994, no writ); *see also Mercer v. Daoran Corp.*, 676 S.W.2d 580, 583 (Tex. 1984). (2) Grant's credibility is likely to be a dispositive factor in this litigation; therefore, summary judgment is not appropriate. *See Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989). (3) His statements that he did not conspire or agree to conspire are not readily controvertible and do not satisfy the requirements of procedural rule 166a. *See American Petrofina Co. of Tex. v. Crump Bus. Forms*, 597 S.W.2d 467, 471 (Tex. App._Dallas 1980, writ ref'd n.r.e.)). Accordingly, we reverse the trial court's summary judgment in favor of Grant.

iii. Summary Judgment for Hinds

DISD filed its third amended original petition dismissing its RICO claims after Hinds filed his motion for summary judgment. Accordingly, Hinds' third ground in support of his motion on RICO claims is moot. Although DISD amended its petition by

filing a third amended original petition, it did not add any new causes of action and its allegations of civil conspiracy remained essentially unchanged. In the second ground of his summary judgment motion, Hinds maintains that DISD has not pled and cannot prove the elements of fraud to support a claim of conspiracy. Because we conclude the trial court properly granted summary judgment on Hinds' first ground for summary judgment, we need not address his second ground. *See* Tex. R. App. P. 47.1.

A. Hinds as Venable's and Grant's Attorney

In Hinds' first ground for summary judgment, he contends "an attorney's act of filing suit on behalf of clients cannot be the basis of a claim for damages." He asserts that he has not represented Grant as a defendant in the 162nd case and that DISD relies exclusively on his actions as attorney of record for Venable as plaintiff and for Grant as third-party plaintiff in the 162nd civil rights case to establish his participation in the alleged unlawful conspiracy; therefore, Hinds contends he is exempt from liability to a party other than his clients for the performance of his duties as an attorney. *See Martin v. Trevino*, 578 S.W.2d 763, 771 (Tex. Civ. App._Corpus Christi 1978, writ ref'd n.r.e.) (generally an attorney is exempt from liability to a party other than his client for damages because an attorney deals at arm's length with adverse parties and, therefore, he is not liable to them for his actions as an attorney on behalf of his client).

Hinds' summary judgment evidence included his affidavit that provides, in part:

2. I am the attorney of record for Don Venable in asserting his claims as Plaintiff in Cause No. 94-09418-I (162nd District Court, Dallas County), I am also attorney of record for Ed Grant

solely in his capacity as Third-Party Plaintiff in the same proceeding in advancing a claim of malpractice against attorneys advocating the commission of civil rights violations by DISD. I am also attorney of record for Ed Grant in Cause No. 95-06824 (68th District Court, Dallas County) in which Mr. Grant has sued TASB and DISD, as administrator and insured, for damages arising from their refusal to provide him with independent counsel under its policy of insurance. In this capacity, I have personal knowledge of the facts and matters stated herein which I affirm to be true and correct.

3. I have no business or financial relationship with Don Venable, Ed Grant, or Rick Finlan, other than my agreement to represent Don Venable and Ed Grant in judicial proceedings as their attorney . . . .

4. I never advised Ed Grant to confess a judgment in favor of Don Venable or Rick Finlan . . .

5. I did not participate in or advise Grant to sign an Agreed Order of Judgment which was subsequently filed in Cause No. 94-09418-I . . . .

6. I have not made any effort nor have I participated in any effort to collect the "Agreed Order of Judgment" from the DISD Insurance Fund . . . .

The evidence DISD placed in the record in response to Finlan's motion for summary judgment shows that Finlan, Venable, and Grant met together and held discussions related to the litigation. However, there is no evidence to show Hinds participated in those meetings or had knowledge of them.

DISD relies on *Kirby v. Cruce*, which holds that the attorney and client are liable to injured parties as co-conspirators where it can be inferred that (1) an attorney has knowledge of deception being practiced

by a client, and (2) the lawyer participated in the scheme and intended to participate in sharing any ill-gotten gains. *Kirby v. Cruce*, 688 S.W.2d 161, 164 (Tex. App._Dallas 1985, writ ref'd n.r.e.). The attorney's acts in *Kirby*, however, did not involve judicial proceedings. Instead, the attorney knew both his own acts and his client's had the capacity to deceive and that their purpose was to obtain a secret profit from a real estate transaction through a joint venture. Here, Hinds has produced uncontroverted evidence that his sole involvement in the matter was his representation as attorney of record for Venable and Grant on diverse claims in a judicial proceeding. There is no evidence or allegation from which it can be inferred that any of Hinds' conduct occurred *outside* the normal course of an attorney's duties. Thus, we hold Hinds is exempt from liability to the adverse parties in the 162nd case. *See Martin*, 578 S.W.2d at 771-72.

DISD did not file a response to Hinds' motion for summary judgment. While the burden does not shift to the plaintiff to present evidence creating a fact issue until the defendant produces evidence entitling it to summary judgment as a matter of law, Walker, 924 S.W.2d at 377, we conclude the evidence Hinds has produced meets this standard. Thus, the burden shifted to DISD to expressly present to the trial court in written answer or response any reason for avoiding Hinds' entitlement to summary judgment. *See* Tex. R. Civ. P. 166a(c); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 (Tex. 1993); *City of Houston*, 589 S.W.2d at 677-79; *Spencer v. City of Dallas*, 819 S.W.2d 612, 616 (Tex. App._Dallas 1991, no writ). Any issue not expressly presented to the trial court in a written motion or response may not be raised as grounds for reversal on appeal. *Green*,

883 S.W.2d at 300. Accordingly, we overrule DISD's sixth point of error as to Hinds.

B. Special Exceptions

In its seventh point of error, DISD contends "[t]he trial court erroneously granted summary judgment rather than special exceptions, as, at most, only pleading deficiencies or 'ripeness' issues could have existed in the DISD's conspiracy claim." DISD's contention is directed solely at the Conspiracy Defendants' argument that DISD had not suffered cognizable damages; therefore, no conspiracy cause of action was viable.

We have concluded the trial court properly granted summary judgment for Hinds on the grounds that Hinds met his burden of proof that he did not participate in the alleged conspiracy. Because neither the trial court's judgment nor our judgment depends on the Conspiracy Defendants' contention that DISD's conspiracy claim was not ripe, we need not address DISD's seventh point of error. *See* Tex. R. App. P. 47.1.

C. Discovery

In its eighth point of error, DISD contends "[t]he trial court erred by prohibiting necessary discovery and then granting summary judgment." DISD's one paragraph argument appears to be aimed at the trial court's refusal to grant DISD's motion for continuance to conduct further discovery.

The granting or denial of a motion for continuance is within the sound discretion of the trial court. *General Motors Corp. v. Gayle*, 951 S.W.2d 469, 476 (Tex. 1997); *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986). Before the reviewing court will reverse the trial court's ruling, it should clearly appear

from the record that the trial court has disregarded the party's rights. *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630, 635 (Tex. 1986). An appellate court may reverse a trial court for abuse of discretion only if, after searching the record, it is clear that the trial court's decision was arbitrary and unreasonable. *Simon v. York Crane & Rigging Co.*, 739 S.W.2d 793, 795 (Tex. 1987). In a summary judgment context, it is generally not an abuse of discretion to deny a motion for continuance if the party has received the twenty-one days' notice required by rule 166a(c). *White*, 995 S.W.2d at 803; *McAllister v. Samuels,* 857 S.W.2d 768, 773 (Tex. App._Houston [14th Dist.] 1993, no writ). In considering a continuance request, a trial court can presume that a plaintiff has investigated its case prior to filing. *White*, 995 S.W.2d at 804; *McAllister*, 857 S.W.2d at 773. Generally, a trial court is presumed to have correctly exercised its discretion when it denies a motion that does not comply with the rules governing continuances. *Villegas*, 711 S.W.2d at 626.

Texas Rules of Civil Procedure 251 through 254 govern continuances. Rule 251 provides that a continuance shall not be granted except for sufficient cause supported by affidavit. Tex. R. Civ. P. 251. Rule 252 provides that if a motion for continuance is sought because of a want of testimony, the applicant shall file an affidavit stating that it has used diligence to procure the testimony, and the applicant's diligent efforts shall be stated in the affidavit. Tex. R. Civ. P. 252.

In this case, DISD filed a motion in the trial court asserting it needed to take the depositions of Grant, Hinds, and Venable, and complete the deposition of Finlan. The motion recites that the trial court stayed discovery in the case. The motion

includes a verification by DISD's trial counsel that the facts stated in the motion are true. The motion, however, does not state or explain that DISD used diligence in obtaining discovery.

DISD's response to Finlan's motion for summary judgment included excerpts from both Finlan's and Grant's depositions. The excerpts from Grant's deposition show he was deposed on at least two separate days. Finlan's deposition was 161 pages in length. DISD's contention on appeal that "[n]o discovery was allowed" is not consistent with the record. Hinds' response to DISD's motion for continuance included Hinds' affidavit which averred the trial court required Finlan, Venable, Hinds, and Grant to submit to depositions by DISD in January 1996. Hinds further averred that he, Finlan, Venable, and Grant, agreed to dates chosen by DISD for depositions. He also averred DISD began deposing Finlan and canceled the remaining depositions.

DISD did not aver that it used diligence in seeking depositions, nor did it show that "no discovery was allowed." To the contrary, the record reflects DISD was given an opportunity to conduct its discovery. After thoroughly reviewing the record, we cannot conclude that the trial court clearly abused its discretion. *See Simon*, 739 S.W.2d at 795; *White*, 995 S.W.2d at 803; *Ramirez*, 973 S.W.2d at 388; *McAllister*, 857 S.W.2d at 773. Accordingly, we overrule DISD's eighth point of error as applied to Hinds.

D. Summary Judgment Evidence

DISD contends the trial court erred in considering the summary judgment evidence submitted by Finlan, Hinds, and Grant. Because we have sustained DISD's sixth point of error as applied

to Finlan and Grant, we only address DISD's contention as it applies to Hinds.

DISD states it lodged objections to the summary judgment evidence of the alleged conspirators, but only generally cites us to 141 pages in the record. It does not provide a single citation to any specific objection. Moreover, DISD contends:

> The only conceivable evidence upon which the movants could have relied in obtaining summary judgment; [sic] that is, testimony that "there is no conspiracy," or that "I didn't do anything wrong, or illegal," etc . . . .

DISD's quotes appear to be directed at Finlan's and Grant's affidavits. As we have noted above, Finlan amended his motion for summary judgment, and his live pleading was not premised on his previously filed affidavit. Also as noted above, we agree with DISD that Grant's affidavit was conclusory and could not support summary judgment. However, DISD's characterization is not accurate as it applies to Hinds' summary judgment evidence, which we have discussed in detail.

DISD has made no effort to cite this Court to any specific complaint about Hinds' summary judgment evidence, and its generic characterizations are inaccurate. The argument in a brief must contain a clear argument for the contentions made, with appropriate citations to the record and to authorities. Tex. R. App. P. 38.1(h); *Melendez v. Exxon Corp.*, 998 S.W.2d 266, 280 (Tex. App._Houston [14th Dist.] 1999, no pet.). An appellate court has no duty to search a voluminous record without guidance from the appellant to determine whether an assertion of reversible error is valid. *Melendez*, 998 S.W.2d at 280. Even if we considered DISD's generic reference

to 141 pages of record as sufficient guidance, DISD, nevertheless, failed to support its position with clear argument. Accordingly, DISD has waived this contention as applied to Hinds. *See* Tex. R. App. P. 38.1(h).

In the interest of justice, we have reviewed the 141 pages of the Clerk's Record to which DISD refers. Pages 1458-1512 contain objections to the affidavits of Finlan and Grant. Pages 2092-2117 contain objections to Grant's affidavit, which was submitted by Finlan. Pages 2118-2122 and 2996-3002 contain objections to "the tape of DISD's Executive Session." Pages 3014-3066 contain additional objections to Finlan's and Grant's affidavits. Having reviewed DISD's citations to the record, we find no citation which supports its argument as applied to Hinds. *See* Tex. R. App. P. 38.1(h); *Melendez*, 998 S.W.2d at 280. DISD's contention is without merit. Accordingly, we overrule DISD's ninth point of error as applied to Hinds.

Because we have overruled each of DISD's contentions that summary judgment was improperly granted to Hinds on the civil conspiracy claim, we affirm the trial court's summary judgment in Hinds' favor on DISD's civil conspiracy claims.

HINDS', FINLAN'S, and GRANT'S CROSS-APPEALS ON DEFAMATION CLAIMS AGAINST LAWRENCE FRIEDMAN, ALAN RICH, AND FRIEDMAN & ASSOCIATES, P.C.

Hinds, Finlan, and Grant contend summary judgment should not have been granted on their defamation claims in favor of Lawrence Friedman, Alan Rich, and Friedman & Associates, P.C. (collectively "Friedman & Associates"). Hinds

presents four issues contending summary judgment should not have been granted on his defamation claims because (1) Friedman's affidavit was insufficient to do more than raise a fact issue, (2) Hinds did not have an opportunity for discovery on Friedman & Associates' affirmative defenses, (3) the summary judgment evidence raised material fact issues precluding summary judgment, and (4) the trial court erred by failing to grant Hinds' motion for new trial on the basis of new evidence.

Finlan's fifth point of error contends Friedman & Associates were not entitled to governmental immunity because they are private attorneys. Finlan's seventh point of error contends Friedman & Associates did not establish their communications were privileged as a matter of law. Grant, acting pro se, adopts the issues raised by Hinds and Finlan regarding the defamation claims. FN:6 The controlling issue is whether Friedman & Associates' statements were privileged as a matter of law.

1. Background

On September 13, 1995, Friedman & Associates filed the DISD Parties' first amended petition in the case at bar against Finlan, Venable, Hinds and Grant alleging they had committed mail fraud, wire fraud, civil violation of RICO, FN:7 and civil conspiracy. FN:8 On the same day, Friedman issued a news release to area news media. Hinds, Venable, Finlan, and Grant responded to the press release by suing Friedman & Associates for defamation. Friedman & Associates moved for summary judgment asserting two grounds: (1) absolute judicial proceedings privilege, and (2) sovereign immunity. The trial court granted Friedman & Associates' motion for summary judgment.

2. Applicable Law

The elements of libel are defined by the civil practice and remedies code, which provides:

A libel is a defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.

Tex. Civ. Prac. & Rem. Code Ann. § 73.001 (Vernon 1997). A statement which falsely charges a person with the commission of a crime is considered to be libelous *per se*. *Christy v. Stauffer Publications*, 437 S.W.2d 814, 815 (Tex. 1969); *Hill v. Herald-Post Publ'g Co.*, 877 S.W.2d 774, 781 (Tex. App._El Paso 1994), *rev'd in part on other grounds*, 891 S.W.2d 638 (Tex. 1994).

Communications and publications made in the due course of a judicial proceeding will not serve as the basis of a defamation action. *Reagan v. Guardian Life Ins.* Co., 140 Tex. 105, 110-111, 166 S.W.2d 909, 912 (1942); *Hill*, 877 S.W.2d at 782. The immunity is absolute even if the statement is false and uttered or published with express malice. *Reagan*, 166 S.W.2d at 912; *Hill*, 877 S.W.2d at 782. The privilege extends to statements made by the judge, jurors, counsel, parties, or witnesses and attaches to all aspects of the proceedings. *James v. Brown, M.D.*, 637 S.W.2d 914, 916 (Tex. 1982); *Hill*, 877 S.W.2d at 782. The privilege also applies to out-of-court communications if the communication bears some relationship to the proceeding and is in furtherance of

the attorney's representation. *Hill*, 877 S.W.2d at 782 (citing *Russell v. Clark*, 620 S.W.2d 865, 870 (Tex. Civ. App._Dallas 1981, writ ref'd n.r.e.)).

This Court's opinion in *Russell v. Clark*, 620 S.W.2d 865 (Tex. Civ. App._Dallas 1981, writ ref'd n.r.e.), provides the proper guidelines for determining when a lawyer's out- of-court communication is absolutely privileged. There, we held:

Public policy demands that attorneys be granted the utmost freedom in their efforts to represent their clients. To grant immunity short of absolute privilege to communications relating to pending or proposed litigation, and thus subject an attorney to liability for defamation, might tend to lessen an attorney's efforts on behalf of [his or her] client. The conduct of litigation requires more than in-court procedures. An attorney must seek discovery of evidence, interrogate potential witnesses, and often resort to ingenious methods to obtain evidence; thus, he must not be hobbled by the fear of reprisal by actions for defamation. Yet this absolute privilege must not be extended to an attorney carte blanche. The act to which the privilege applies must bear some relationship to the judicial proceeding in which the attorney is employed, and must be in furtherance of that representation. *Id.* at 868. Whether a lawyer's out-of-court statement is related to a proposed or existing judicial proceeding is a question of law to be determined by the court. *Id.* at 870. When deciding the issue, "the court must consider the entire communication in its context, and must extend the privilege to any statement that bears some relation to an existing or proposed judicial proceeding." *Id.* All doubt should be resolved in favor of the relevancy of the statement. *Id.* The mere delivery of pleadings in pending litigation to members of the news media does

not amount to a publication outside of the judicial proceedings, resulting in the waiver of the absolute privilege. *Hill*, 877 S.W.2d at 783.

3. Application of Law to Facts

Friedman & Associates' out-of-court press release stated as follows:

September 13, 1995

For Immediate Release
Attention News Director

The Dallas Independent School District filed suit today in Dallas District Court against Richard Finlan, Don Venable, Ed Grant, who is a former member of the DISD Board of Trustees, and Ronald Hinds, who is the attorney for Don Venable and Ed Grant, for Fraud, Civil Conspiracy, and Racketeering. The DISD has been patiently dealing with Venable, Finlan, and Grant within the confines of the courtroom in suits initiated by them; however, the time has come to expose to the public what these men are truly trying to accomplish.

These men are not serving as "self-appointed government watchdogs." As has been publicly released, Venable and Finlan are seeking a $1,650,000 settlement from DISD. They are only out for their own personal gain seeking to create a financial windfall for themselves by harassing the DISD with the filing of frivolous lawsuits and seeking the private bank records of the members of the DISD Board of Trustees. The lawsuit seeks actual and punitive damages of $1,500,000.

The DISD's attorney, Lawrence J. Friedman, will be available for comments today.

We agree with the El Paso Court of Appeals that the mere delivery of pleadings in pending litigation to members of the news media does not amount to a publication outside of the judicial proceedings, resulting in the waiver of the absolute privilege. *Hill*, 877 S.W.2d at 783. The harm resulting to a defamed party from delivery of pleadings in a lawsuit to the news media could demonstratively be no greater than if the news media found the pleadings on their own. *Id.* Likewise, we conclude that advising the media that a lawsuit has been filed, including a basic description of the allegations, has no practical effect different from providing the pleadings to the media.

Here, the first amended petition itself and the statements in the press release which relate the allegations in that petition are absolutely privileged pursuant to the judicial proceeding privilege. *Id.* at 782. The statement that "the DISD has been patiently dealing with [the defendants] within the confines of the courtroom in suits initiated by them; . . ." relates to pending litigation among the same parties. Likewise, the second paragraph above relates to pending litigation and settlement efforts.

We recognize the issues raised in this lawsuit, and issues concerning DISD in general, have played a prominent role in the local news media. Nevertheless, we are mindful that we must resolve all doubt in favor of the relevance of the lawyer's statement. *Russell*, 620 S.W.2d at 870. Further, we must extend the privilege to any statement that bears some relation to a judicial proceeding. *Id.* Under the facts of this case, we hold that the press release had some relation to this lawsuit in particular and to other litigation between the same parties. Therefore, the statements

were privileged and cannot serve as the basis of a defamation action. *Reagan*, 166 S.W.2d at 912; *Hill*, 877 S.W.2d at 782, *Russell*, 620 S.W.2d at 868.

We overrule Hinds' first, second, and third points of error and Finlan's seventh point of error because the press release was permissible as a matter of law under the judicial proceedings privilege. We overrule Grant's points of error adopting Hinds' first, second, and third points of error and Finlan's seventh point of error.

4. Hinds' Motion for New Trial

In Hinds' fourth point of error, he contends he should have received a new trial because of newly discovered evidence. In litigation between some of the same parties, this Court has previously stated the standard a party must meet when seeking a new trial on the basis of newly discovered evidence.

A party seeking a new trial on the ground of newly discovered evidence must show the trial court that: (1) the evidence has come to his knowledge since the trial; (2) it was not owing to the want of due diligence that it did not come sooner; (3) it is not cumulative; and (4) it is so material that it would probably produce a different result if a new trial were granted. *Jackson v. Van Winkle*, 660 S.W.2d 807, 809 (Tex.1983).

Whether to grant such a motion is within the sound discretion of the trial court, and the trial court's action will not be disturbed on appeal absent an abuse of such discretion. *Id.* In considering the motion, the trial court considers the weight and the importance of the new evidence and its bearing in connection with the evidence received at trial. *Id.* "The inquiry [is] not whether, upon the evidence in the record, it

apparently might have been proper to grant the application in the particular case, but whether the refusal of it has involved the violation of a clear legal right or a manifest abuse of judicial discretion." *Id.* Every reasonable presumption will be made on review in favor of orders of the trial court refusing new trials. *Id.* *Keever v. Finlan*, 988 S.W.2d 300, 315 (Tex. App._Dallas 1999, pet. dism'd).

Hinds relies on William Keever's testimony. Keever was serving as DISD Board President at that time. Keever testified he (1) never authorized a press release at DISD and (2) did not know whether the DISD board had authorized Friedman to issue a press release concerning the lawsuit. Assuming, without deciding, Hinds meets the first three *Jackson* factors for a new trial, we focus our analysis on the fourth factor, which is dispositive. The fourth *Jackson* factor requires Hinds to show the new evidence is so material that it would probably produce a different result if a new trial were granted. The facts are undisputed that Friedman & Associates had authority to file suit on behalf of DISD. Because we have already determined the press release bore some relation to judicial proceedings, the trial court did not abuse its discretion by its presumed finding that the testimony by Keever was immaterial on the issue of whether the press release was absolutely privileged. *See Jackson*, 600 S.W.2d at 809; *Keever*, 988 S.W.2d at 315. We overrule Hinds' fourth point of error. We also overrule this point of error as adopted by Grant.

We need not address Finlan's fifth point of error (no governmental immunity) as applied to the defamation claims or Grant's point of error adopting Finlan's fifth point of error, because we have based our ruling on Friedman & Associates' alternative

ground. Tex. R. App. P. 47.1; *Holloway*, 840 S.W.2d at 18.

RICHARD FINLAN'S CROSS-APPEAL ON HIS CIVIL RIGHTS CLAIMS

Finlan's cross-points of error one, two, three, four, five, six, and eight concern his civil rights claims. Finlan contends DISD violated his civil rights by filing suit against him in retaliation for publicly criticizing DISD. For the reasons below, we affirm the trial court's grant of summary judgment in favor of all DISD Parties except DISD itself. As to DISD, we reverse and remand.

1. Background

On September 1, 1995, Finlan and Venable sent a letter to Chad Woolery asking for all of the DISD Trustees' campaign finance reports and all of the backup documents to the campaign finance reports. On September 6, 1995, Chad Woolery and all of the DISD Trustees, except for Kathleen Leos, filed a declaratory judgment action against Finlan and Venable seeking a declaration that the backup documents did not have to be given to Finlan and Venable. On September 11, 1995, they non-suited their declaratory judgment action given a change in the law prohibiting suits against a person requesting public information. This statute became effective September 1, 1995 -- five days before the declaratory judgment suit was filed.

However, that same day, on September 11, 1995, Finlan filed a counterclaim alleging DISD, Woolery, the DISD Trustees, except Leos, and the DISD attorneys conspired to violate his civil rights under section 1983 because the declaratory judgment action was a retaliatory suit brought solely because he wrote the September letter asking for what he thought were

public documents. On September 13, 1995, the DISD Parties filed their first amended petition, described above, alleging in part that Finlan, Venable, Grant, and Hinds had conspired to defraud DISD and its taxpayers.

On November 8, 1995, Finlan filed an amended counterclaim alleging as before that the DISD Trustees, excluding Leos, and DISD Attorneys had violated his civil rights under section 1983 by filing the original declaratory judgment claims. In addition, Finlan's amended counterclaim also alleged that the DISD Trustees, including Leos, and the DISD Attorneys had further violated his civil rights under section 1983 by retaliating against Finlan for exercising his right to petition against DISD in the civil rights suit filed in the 162nd District Court and by attempting to "drive him from the courthouse" by filing the civil conspiracy claims.

All DISD Parties, except DISD itself, filed motions for summary judgment claiming they were immune from suit under the *Harlow* FN:9 doctrine of qualified immunity. DISD claimed it was not a "person" under section 1983 because it was an arm of the state, and, therefore, it was entitled to immunity based on the Eleventh Amendment to the United States Constitution. The DISD Attorneys also moved for summary judgment on the merits of Finlan's section 1983 claims.

2. Applicable Law and Application of Law to Facts

a. DISD's Contentions

Finlan's eighth cross-point of error contends the trial court erred in dismissing his civil rights suit against DISD on the basis of the sovereign immunity afforded the individual states under the Eleventh Amendment to the federal constitution. DISD

concedes this point of error citing *San Antonio Indep. Sch. Dist. v. McKinney*, 936 S.W.2d 279, 280 (Tex. 1996), which was decided several months after the trial court granted summary judgment on this immunity defense.

In DISD's motion for summary judgment, it argued "[b]ecause the DISD is an agency of the state, and because agencies of the state are not "persons" under Section 1983, the Court must grant summary judgment in favor of the DISD on the Cross-Plaintiffs' Section 1983 claims." DISD relied on *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71(1989), which holds States are not persons under section 1983 civil rights claims. However, Congress intended for municipalities and other local government units to be considered persons under section 1983 and, therefore, subject to suit. *See Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 690 (1978). FN:10

Our supreme court has now held, ". . . an independent school district is more like a county or city than it is like an arm of the State of Texas . . . ." *San Antonio Indep. Sch. Dist.*, 936 S.W.2d at 284. Because DISD is not considered an arm of the State for Eleventh Amendment purposes, DISD's argument that it is not a person under section 1983 fails. *See Monell*, 436 U.S. at 690. For these reasons, we sustain Finlan's eighth cross-point of error.

As Finlan contends in his motion for rehearing, DISD did not assert any other grounds for summary judgment. Accordingly, we reverse and remand Finlan's civil rights claim against DISD for further proceedings.

b. Qualified Immunity Analysis

Government officials performing discretionary

functions are entitled to the defense of qualified immunity, which shields them from liability for civil damages, if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

To be entitled to qualified immunity, a public official must demonstrate that he was "acting in his official capacity and within the scope of his discretionary authority." *Barker v. Norman*, 651 F.2d 1107, 1121 (5th Cir. Unit A 1981). Discretionary authority exists when the law does not specify the precise action that the official must take. *Davis v. Scherer*, 468 U.S. 183, 196 n.14 (1984); *see also Jolly v. Klein*, 923 F. Supp. 931, 948 (S.D. Tex. 1996) ("An act is discretionary under Texas law if it requires personal deliberation, decision, and judgment.").

The DISD officials' decision to allow the filing of the claims of which Finlan complains was a wholly discretionary act taken within their official authority. When faced with a request for backup documents to their campaign finance reports, the DISD Trustees' action in filing a declaratory judgment action was taken solely as a result of and wholly related to their status as DISD officials. A public official is frequently the subject of impending litigation, and the hands of the official are not tied; attorneys may be employed to respond in whatever manner is appropriate. *See Stewart v. Newton Indep. Sch. Dist.*, 134 S.W.2d 429, 431 (Tex. Civ. App._Beaumont 1939, no writ) ("School district trustees have the general power to employ an attorney to represent them in legal proceedings respecting school affairs and to pay such attorney reasonable compensation for his services out of the special maintenance funds of

the district."). The DISD Trustees' claims were not "personal suits," as Finlan erroneously calls them, but claims made as elected members of the DISD Board of Trustees in response to a request for backup documents kept in connection with campaign finance reports. School board trustees have broad authority to expend funds to defend and initiate lawsuits in matters relating to their office and to district management. *See* Tex. Educ. Code Ann. § 11.151 (Vernon 1996) § 45.105 (Vernon Supp. 2000); *see also Stewart*, 134 S.W.2d at 431. The DISD officials acted within their discretionary authority in approving the filing of the lawsuits.

In deciding a motion for summary judgment that raises the affirmative defense of qualified immunity, the court must utilize a sequential two-step inquiry. *Siegert v. Gilley*, 500 U.S. 226, 231-32 (1991). First, a court must decide the "purely legal question" of "whether the conduct of which the plaintiff complains violated clearly established law" at the time of the defendant's actions. *Id.* at 232-33 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). This "narrow threshold question . . . is always a matter of law for the court, [and] hence is always capable of decision at the summary judgment stage." *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992); *see also Elder v. Holloway*, 510 U.S. 510, 516 (1994). If the law was not clearly established, then summary judgment is proper without an inquiry into reasonableness because an official could not reasonably be expected to know that the law forbade his conduct. *Harlow*, 457 U.S. at 818. But if the law was clearly established, the court must then determine the second inquiry of whether the defendant's conduct was objectively reasonable -- an inquiry that "may or may not be . . . subject to determination as a matter of law." *Pritchett*, 973 F.2d

at 313.

The United States Court of Appeals for the Fifth Circuit follows this sequential two- step approach, first asking whether the plaintiff has alleged the violation of a clearly established constitutional right and, if so, then asking whether the defendant's conduct was nevertheless objectively reasonable. *See, e.g., Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997). A constitutional right is "clearly established" when its contours are sufficiently clear that a reasonable public official would understand what he or she is doing violates the right. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Foster v. City of Lake Jackson*, 28 F.3d 425, 429 (5th Cir. 1994).

If public officials or officers of "reasonable competence could disagree [on whether an action is legal], immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Gibson v. Rich*, 44 F.3d 274, 277 (5th Cir. 1995) (citing *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994)). Conversely, an official's conduct is not protected by qualified immunity if, in light of clearly established pre-existing law, it was apparent the conduct, when undertaken, would be a violation of the right at issue. *Foster*, 28 F.3d at 429.

In his first and second cross-points, respectively, Finlan maintains the trial court erroneously applied federal summary judgment standards and granted the summary judgments at issue on special exceptions. We disagree. First, whether to allow special exceptions is procedural, and state courts follow state procedure. *See Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 929 n.1 (Tex. 1998). Second, the movants moved for summary judgment based on qualified immunity supported by summary judgment

affidavits. The trial court applied substantive federal immunity law. *See Bastow v. State*, 742 S.W.2d 495, 501 n.2 (Tex. App._Austin 1987, writ denied) (state courts are required to follow federal substantive law).

Finlan also argues that, rather than granting summary judgment dismissing his claims, the trial court should have deemed the summary judgment motions to have been special exceptions and allowed Finlan an opportunity to replead. He interprets the rulings on the inadequacy of his pleadings as a failure to state a cause of action to which he has a right to replead before dismissal. He is in error in this instance, because the initial issue of qualified immunity may always be determined at the summary judgment stage. *Pritchett*, 973 F.2d at 313.

Turning to the threshold inquiry regarding the qualified immunity defense, the legal right at issue in this case is Finlan's right not to be subjected to a civil suit for allegedly exercising his free speech rights and for invoking his right to access the courts. Thus, the legal question is whether the law was clearly established in 1995 that the filing of a civil suit, alleged to be malicious and retaliatory, would violate an individual's First Amendment rights to free speech and access to the courts.

The Fifth Circuit has ruled that there is no clearly established right to claim a First Amendment violation from the filing of a civil lawsuit, even one alleged to be malicious prosecution, in retaliation for the exercise of free speech rights. In *Johnson v. Louisiana Department of Agriculture*, 18 F.3d 318 (5th Cir. 1994), the operator of a defunct crop-dusting business brought a section 1983 action against the Louisiana Department of Agriculture and its commissioner, contending that they had violated his First Amendment rights by bringing a series of

administrative proceedings against him and his business. The trial court held that these allegations failed to state a claim under section 1983 for violation of the plaintiff's First Amendment rights, and the Fifth Circuit affirmed. *Id.* at 321.

The court first noted that if plaintiff's allegations asserted a claim on any basis, "the claim is one for malicious prosecution in violation of Johnson's First Amendment rights." *Id.* at 320. The *Johnson* court then observed that "[w]hether the Constitution comprehends any such claim *is far from clear*." *Id.* (emphasis added.) Accordingly, we hold that in 1995 there was no clearly established law that the filing of a civil suit in retaliation violated an individual's free speech rights.

The Fifth Circuit has also recognized that it is well established that access to the courts is protected by the First Amendment right to petition for redress of grievances. *Roland v. Shapiro*, 708 F.2d 967, 971-72 (5th Cir. 1983); *Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979). The right of access to the courts is implicated "where the ability to file suit was delayed, or blocked altogether." *Foster*, 28 F.3d at 430.

Finlan has not alleged, much less established, his ability to file suit was in any way delayed or blocked altogether. Rather, he has been a frequent party to litigation against DISD Trustees. *See, e.g., Keever v. Finlan*, 988 S.W.2d 300 (Tex. App._Dallas 1999, pet. dism'd); *Venable v. Keever*, 960 F. Supp. 110 (N.D. Tex. 1997). The government's filing of a civil lawsuit against an individual in no way stands as an "official impediment" to that individual's "facilitative right to institute a suit." *Hale v. Townley*, 457 F.3d 914, 920 (5th Cir. 1995). Thus, we hold that Finlan's constitutional right to access to the courts was not

violated under our facts. We hold that the trial court properly granted Woolery and the Dallas Trustees' motion for summary judgment asserting the defense of qualified immunity.

The DISD Attorneys contend they are also entitled to qualified immunity because, even though they are private attorneys, they were specially employed to represent a governmental entity. We need not address this issue, because the DISD Attorneys also filed a motion for summary judgment on the merits. We have held the filing of the civil case was not a constitutional violation; therefore, if Woolery and the DISD Trustees are not liable to Finlan, it necessarily follows that their attorneys cannot be liable under section 1983 for the same conduct.

We overrule Finlan's cross-points one, two, three, and four; we do not reach his cross- point five (attorney not entitled to governmental immunity); and we hold that he has waived his cross-point six (original suit was illegal under Texas law) by not raising this issue in the trial court in his response to the DISD Parties' motions for summary judgment based on the qualified immunity doctrine. *See Lee v. Braeburn Valley West Civic Ass'n.*, 786 S.W.2d 262, 263 (Tex. 1990).

CONCLUSION

The backup documents comprising the record of information to support campaign finance reports are not subject to release to the public under the Texas Election Code. We reverse the trial court's judgment with regard to the backup documents and render judgment that Finlan is not entitled to backup records of DISD Trustees.

We reverse the trial court's grant of summary judgment against DISD on its civil conspiracy claim

against Finlan and Grant, and remand for further proceedings.

We affirm the trial court's judgment dismissing DISD's civil conspiracy claim against Hinds.

We affirm the trial court's judgment against Hinds', Finlan's, and Grant's defamation claims, because Friedman & Associates' statements were absolutely privileged under the judicial proceedings privilege.

We reverse the trial court's judgment granting DISD's motion for summary judgment on Finlan's civil rights claims and remand for further proceedings because the basis for DISD's motion for summary judgment does not have merit.

We affirm the grant of summary judgment against Finlan on his civil rights claims as to the DISD Parties, other than DISD and the DISD Attorneys, because the filing of the civil case at issue was not a constitutional violation.

We affirm the trial court's grant of summary judgment to the DISD Attorneys on the merits of Finlan's civil rights claims, because the other individuals included in the DISD Parties are not liable, and, therefore, their attorneys cannot be liable for the same conduct.

ANNETTE STEWART
JUSTICE, ASSIGNED

Publish
Tex. R. App. P. 47

FN:*1*
1 The Honorable Annette Stewart, Justice, Court of Appeals, Fifth District of Texas at Dallas, Retired, sitting by assignment.

FN:*2*
2 T EX . E LEC . C ODE A NN . (Vernon Supp. 2000), referred to hereinafter as "the code."

FN:*3*
3 Venable did not move for summary judgment against DISD on DISD's conspiracy claims, and is not a party to this appeal.

FN:*4*
4 42 U.S.C.A. § 1983 (West Supp. 2000), hereinafter referred to as "section 1983."

FN:*5*
5 As stated previously, substituted or amended motion for summary judgment supercedes and supplants the previous motion, which may no longer be considered. *Frias*, 999 S.W.2d at 102; *Seventeen Thousand & No/100 Dollars U.S. Currency*, 809 S.W.2d at 639. The record does not affirmatively demonstrate that Grant joined either of Finlan's later two motions for summary judgment.

FN:*6*
6 The adoption of points of error in multiparty appeals "should be encouraged to conserve words, paper, and the eyesight of the members of the judiciary." *City of San Antonio v. Bynum*, 933 S.W.2d 651, 652 (Tex. App._San Antonio 1996, no writ)

(quoting *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 666 (Tex. App._Texarkana 1991, writ denied)).

FN:*7*

7 Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. § 1961, et seq. (West 1984 & Supp. 1999).

FN:*8*

8 On April 17, 1996, DISD filed its third amended petition, which did not include the racketeering, mail fraud, or wire fraud allegations.

FN:*9*

9 *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

FN:*10*

10 The *Will* case discussed *Monell* with approval. *Will*, 491 U.S. at 70-71.

File Date[08/28/2000]
File Name[970734HF]

EXCERPTS FROM TRANSCRIPT

DALLAS INDEPENDENT SCHOOL DIST. Meeting: September 24, 1992

EXERPTS: Transcript 1150 - 1168

Dennis Eichelbaum: "The question is: Are we ready to take action? We talked to you about it the other day. We've done some research and we believe that they have violated the law as far as tortious interference with a contract and we think that we may now be able to get Mr. Venable for practicing law without a license. It is our suggestion that we file a lawsuit and go after them and go after three people in this case because two people aren't going to care about being sued. Mr. Venable and Mr. Finlan find this to be a lot of fun. But, they've involved a third person because every pleading that they've filed and the letter that they sent to New York all came through the fax machine of David L. Venable, which is Don Venable's brother, who is an attorney. His name comes out on all those faxes because there is a little thing on the bottom. That means that he is allowing them to practice law in his law practice. You can't do that. It also means that he is endorsing what they are doing. If we sue all three

of them, he might not like them doing that anymore out of his office, and there is going to be a big rift between them. Plus, he has assets. The other two may not, but he definitely has assets. And this will put them on the retreat. That is our recommendation. Sir?"

Sandy Kress: "Let me ask you this question, Dennis. Okay, let me play them and tell what the answer is to this: This is a public entity. We have a right to free speech. We have a concern about how the DISD meets its business. We believe we are free as citizens to be able to express those concerns to anyone. We were concerned that a . . that a . . that a entity was about to get involved in . . marketing some bonds. We felt that they needed to know. We felt they should know. We, you know . . that . . that this . . this action, this lawsuit was not being taken into account, was not understood. And we thought, and we think, and we think it is our right to be able to express those interests to anyone, to whomever may be effected by the presence of our lawsuit. Now, that's our constitutional right. Now how do, how do you respond to that, given that fact that we are a

public entity involoved and so forth and so on?"

Dennis Eichelbaum: Our response to that would be that, while they have a right to go and try to file an injunction, they do not have a right, prior to filing an injunction, to send a letter to New York and interfere with our contract that was going on. Where their right comes in is to go to court, . . like they eventually tried doing."

Sandy Kress: "Not to communicate . . ."

Dennis Eichelbaum: It does not mean that they can communicate with other entities and try to interfere with our contracts."

Sandy Kress: "Do you have case law on this?"

Dennis Eichelbaum: "Yea."

Sandy Kress: Give me odds on this . . on the chances that we prevail against a citizen, communicating with this public entity . . ."

Dennis Eichelbaum: "Odds of prevailing are probably better than fifty percent. Odds of getting money . . . no one is going to give DISD that much money. You know, we are going to sue them for sixty-million dollars because that is what the contract was. What that means to them is,

they can't get loans . . . pending that lawsuit. Their credit line is shot. David Venable's got problems with his credit line . . . because of all these things. That's the outcome . . . of what happens. And, because we filed a lawsuit in a different court, we can do discovery on that issue. Whereas, in this other case that is pending, we can't do any discovery and neither can they because there's an agreed order. In this new lawsuit, we can put them in depostions and instead of them working, and making money, they're going to be here being deposed on a daily basis."

* * * * *

Sandy Kress: "And I think that the alleg(ations), I like the allegations. Well, we're turning the allegation back on them. They're saying to us you're wasting taxpayer dollars. We're saying to them you interfered in a very dangerous way here and caused . . . we are mindful of the taxpayer. And that's why we can not tolerate what you('ve) just done. I think putting them on the defensive, making them use their resources in defense, letting them know we are serious bringing the brother in, you bet. Anybody that has any money, any

clout in that deal, you bet, let them defend themselves for a while. It is easier for these crazy people, are not going to back off until the game changes and tend to defer to your judgment. Your, your, I, I'm, I, it's a close enough issue, it's a close issue, but I tend to defer to you two and I, I, for one, would be in favor."

Rene Castilla: "Mr. Peavy?"

Dan Peavy: "I didn't mean to infer that I'm not in favor of it. I'm just, I'm concerned about the conditions of which, I mean, I'm in favor of going out and getting a Racehorse Haynes. Okay? That's how concerned I am about this thing. I'm worried about, do we have the proper, I mean, we need to make sure that the public understands that we mean business on this thing and, you know, the DISD hasn't gone out lightly and filed lawsuits against people. And I think that it might even be interesting . . . What type of, don't take this personal, what type of background do you all have in this type of litigation?"

Dennis Eichelbaum: "I'm not sure I understand what you mean by the question. You mean as plaintiffs, you mean?"

Dan Peavy: Well, I'll just rephrase it. What type of background do you all have, as lawyers, in handling litigation of this nature?"

Dennis Eichelbaum: You didn't change the question."

Sandy Kress: "Tortious interference."

Dan Peavy: "Well, no, it (be)cause it's a good question."

Dennis Eichelbaum: "We've never had a tortious interference lawsuit. We;ve had plenty of tort lawsuits, plenty of contract lawsuits, but tortious . . .

Dan Peavy: "That not what . . . (spoken over)"

Dennis Eichelbaum: ". . . interference is a unique kind of lawsuit. We've had plenty of cases where we've been plaintiffs."

Dan Peavy: "I guess what I'm saying is I hate to file a lawsuit against this guy and lose in any form or fashion. And I, and I'm, . . . I'm not coomfortable with hiring outside attorneys but if we're gonna, this may be a case where we need some expertise in this particular type thing. We might need a . . . a high profile individual to come in and work with the situation to . . . if no more than to some of the PR that, that we could develop from it to counter some of the other type of

PR that is going to come from it anyhow, which is the PR that they are going to give us, and, of course, the timing of the bonds and all, it might just the time that we need to . . . call Fort Worth or . . get some of these high dollar . . . You understand what I'm saying Sandy? I, I don't know."

Rene Castilla: "I think your point is well taken. But, would it send the wrong public relations message if we went out and got a high-powered lawyer to sue Venable (and Finlan) instead of just using in-house counsel who can file a lawsuit? There may be a downside to that. I don't . . ."

* * * * *

Hollis Brashear: "I would agree that we do need to file a lawsuit. I do, I do share some concerns with Dan about the brother, of whether that would be considered as frivolous, that we, as a big, big district, jumping on this guy. And, from a public perception point of view, I disagree with Dan in that, if you bring a high-powered lawyer in, the public opinion will go, shift towards the underdog, because he, he becomes the underdog. And, then the sentiment and everything shifts towards that.

And that's where we're really playing the game is. We're trying to keep ourselves in a posture where we don't attract any unfavorable publicity as we look forward to the bond program. So I would, I would favor your firm continuing since we are doing this to stop some action on their part. And then if it, if it looks, as we get on down the trail, that the getting gets harder and harder, you gotta' bring a relief pitcher in, then you gotta look at that. But, I would say now that you, you're in the best position to do all the things that are necessary to do what we want to do, which is to send that message, strong message."

* * * * *

Sandy Kress: "Let me say one other thing to you, Dennis, which is why I have come down to the position that I have. Look, we're going to get it . . . everyone knows that we are about to go out on a bond campaign. Okay? These people know it. Venable and Finlan know it. And we know what their timing is. We know what their game plan is. They're going to start the attack. That attack is going to be leveled against us no matter

what the Deloitte & Touche report says. And there is going to be a flurry of activity (be)cause they are going to try to go after us at our weakest point. And frankly, let's not play any kind of game about the public relations issue. They're gonna be attacking us . . . big time between now and December 5th. And frankly, I think your strategy makes sense because we need to . . . it's gonna be out there, it isn't gonna be pleasant, and the question is: Is it confusing? Is it both ways? Is it a disput? Is it an unpleas(ant), unhappy dispute, or Is it we're getting attacked. And I say the former."

57.

Excerpts:

Cause No. 92-12023 -K

Dallas County, Texas

Dallas Independent School District,

Plaintiff,

vs.

Don Venable, Richard E. Finlan, and David Venable,

Defendants.

Transscript: 1622 (Exhibit D to Finlan's Motion for Partial Summary Judgment and Memorandum in Support, November 30, 1995); *see also* Kress v. Venable WL 211556 (Tex.App.--Dallas April 30, 1997).

From Cause of Action I, paragraphs 30-31:

"At all times hereinabove mentioned, Goldman Sachs & Co., was one of DISD's most important sources of capital and money market funds. Further, Goldman, Sachs, & Co., was and continues to be a significant source of credit information to other financial institutions with whom DISD does (and must do) business and obtains (and must obtain) credit and with whom DISD will attempt to enter into business relations and make efforts

to obtain credit in the future. Consequently, the slanders and libels written, spoken and transmitted by defendants have irreparably harmed and damaged DISD. As a direct and proximate result of defendants' false and libelous statements, plaintiff has endured shame, embarrassment, humiliation, and loss its good name, reputation and credit worthiness. The publication of the tortious letter is libelous and actionable, pursuant to Section 73.001 of the Civil Practice and Remedies Code. Plaintiff, therefore, claims general damages in a sum in excess of the minimum jurisdictional limits of the Court. [31] Defendants publication of the slanderous and libelous tortuous [sic] letter was done with an entire want of care and was done with conscious indifference to the rights and welfare of the plaintiff. Plaintiff, therefore, is entitled to recover exemplary damages. Accordingly, plaintiff sues for actual and exemplary damages in a sum of $10,000,000.00."

From Cause of Action II, paragraphs 39-40:
:As a result of defendants' interference with the agreement, Goldman, Sachs & Co., lost a

substantial amount of money on the transaction with DISD. Due to this loss, Goldman, Sachs & Co., and other financial institutions, in the future, will hesitate to underwrite or purchase obligations of DISD. Because of the tortious interference with the agreements, DISD will not be able to borrow money in the capital markets or, if able to do so, will have to pay a substantial premium. [40] As a result of defendants' interference with the agreement, plaintiff has been damaged in the amount of $10,000,000.00.

From Cause of Action III, paragraphs 56-57:
"There was no probable cause for the attempt to obtain the TRO and the defendants sought to obtain it only as a means of interfering in the issuance of the Notes. [57] Plaintiff was injured by the irregularity in the defendants' use of the process as hereinbefore set out. Plaintiff's damages exceed $10,000,000.00.

Final Cause of Action:
"Alternatively, and should the bond package scheduled for December, 1992, fail due, in part, to the actions of the defendants, for an additional $270,000,000.00."

EXCERPTS

June 22, 1995 Resolution; File #38045 - Action on Venable/Finlan Litigation
Transcript: 1622 (Exhibit E to Finlan's Motion for Partial Summary Judgment and Memorandum in Support, November 30, 1995).

"On the motion by Mr. Peavy, seconded by Mr. Keever, the following was approved by a vote of 8-0: In the opinion of the Board of Education, the litiation [sic] between . . Richard Finlan . . . and the Dallas Independent School District, its employees, officials, and agents, which has over the last five (5) years involved multiple lawsuits, should no longer be permitted to expend such significant amounts of General Counsel's time from more pressing legal matters in representing the District. It is the opinion of the Board that Larry Friedman and Associates should be designated lead counsel in all such litigation.

The Board of Education believes that it is appropriate to instruct its General Counsel, Dennis J. Eichelbaum, along with such other attorneys as its General Counsel may

designate, to file such pleadings and law-suits as necessary to resolve all matters between . . Richard Finlan . . and the Dallas Independent School District, its employees, officials, and agents.

After consultation with the Board President and General Superintendent, through and with the consent of the District's General Counsel, designated counsel shall file these motions at a time believed to be appropriate."

EXCERPTS

Cause No. 95-09677-H

Dallas Independent School District,
Sandy Kress, Chad Woolery, Hollis
Brashear, William Keever, Lynda McDow,
Dan Peavy, Yvonne Ewell and Jose Plata,
plaintiffs,

vs.

Richard E. Finlan, et al.
defendants.

Transcript 44-48: Plaintiffs' Original Petition

"That on September 1, 1995, [Finlan] made a request to Chad Woolery that he give [Finlan] access to any and all documents that any individual trustee of the DISD maintained pursuant to Texas Election Code, Title 15, Section 254.001(a)."

Original Petition, page 2.

"Plaintiffs have retained the undersigned law firm to represent them in this action and have agreed to pay the firm reasonable and necessary attorneys' fees for preparation and filing of this Petition. An award of reasonable and necessary attorneys'

fees to Plaintiffs would be equitable and just and therefore authorized by Section 37.009 of the Civil Practice and Remedies Code."

Original Petition, page 4.

"A declaration that the individual trustees are not a "governmental body" and/or a "school district board of trustees" pursuant to V.A.T.S. Government Code "552.021 and 552.003 (a)(5) and as such neither the trustees nor the DISD have a duty to respond to [Finlan's] requests . . ."

Original Petition, page 4.

64.

EXCERPTS

Cause No. 95-09677-H

Dallas Independent School District,

plaintiff,

vs.

Richard E. Finlan, et al.

defendants.

Transcript 265-271: Plaintiff DISD's First Amended Original Petition - civil conspiracy and conspiracy to commit racketeering

"The scheme began in 1992, when Finlan, Venable (and Venable's brother) made a series of false statements in a letter to DISD's investment bankers . . ."

Amended Petition, page 2

"Because of Finlan's . . purposeful tortious interference with the relationship and contracts by and between the DISD and its investment banker, Goldman, Sachs & Co., the DISD filed suit against . . Finlan in September [sic] of 1992 (the 'Tortious Interference Suit'). The Tortious Interference Suit was eventually dismissed . . ."

Amended Petition, page 3.

"The conspiracy was simple. Venable and Finlan would file suit against DISD trustees . . for supposedly violating Venable's and Finlan's "civil rights" (the "Civil Rights Suit").

Amended Petition, page 3.

"The acts of the Defendants constitute a conspiracy under Texas law. The Defendants have reached agreement to engage in a scheme to defraud the DISD and the taxpayers residing within the Dallas Independent School District."

Amended Petition, page 5.

"The DISD and the taxpayers have been damaged by this unlawful conspiracy. The DISD's damages exceed the jurisdictional amount, and, at this time, exceed $250,000. This conspiracy also entitles DISD to receive punitive damages in excess of $1,000,000 from each Defendant."

Amended Petition, page 6

"The actions of [Finlan] . . in committing the predicate acts of mail fraud

under 18 U.S.C. '1341, and wire fraud under 18 U.S.C. '1343, constitut[e] a pattern of racketeering activity, with the object of investing [his] ill-gotten gains into maintaining RICO enterprises, constitute a conspiracy to violate 18 U.S.C. '1961, et. seq. in violation of 18 U.S.C. '1962(d)."

Amended Petition, page 6.

(3)

Supreme Court, U.S.
FILED
JUL 26 2001
OFFICE OF THE CLERK

No. 00-1940

In The

Supreme Court of the United States

RICHARD E. FINLAN,

Petitioner,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT, SANDY KRESS, CHAD WOOLERY, HOLLIS BRASHEAR, WILLIAM KEEVER, LYNDA McDOW, KATHLEEN LEOS, YVONNE EWELL, LARRY FRIEDMAN, ALAN RICH, FRIEDMAN & ASSOCIATES, P.C., DENNIS EICHELBAUM, and SCHWARTZ & EICHELBAUM, P.C.,

Respondents.

On Petition For A Writ Of Certiorari To The Texas Supreme Court

DISD RESPONDENTS' RESPONSE TO FINLAN'S WRIT OF CERTIORARI

JOHN ANDREW MARTIN
Counsel of Record for Respondents Sandy Kress, Chad Woolery, Hollis Brashear, William Keever, Lynda McDow, Kathleen Leos, and Yvonne Ewell (the "DISD Respondents")
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QUESTIONS PRESENTED

1. Are the DISD Respondents – its Trustees and Superintendent incumbent in September 1995 – entitled to Qualified Immunity and why did Finlan's Petition for Writ of Certiorari not cite and discuss *Harlow v. Fitzgerald*?

2. Does this Court's holding in *Albright v. Oliver* – also not cited nor discussed in Finlan's Petition – preclude Finlan from claiming that he had "substantive Fourteenth Amendment rights" that were violated by acts of the Respondents?

3. Doesn't *Paul v. Davis* and the Fifth Circuit's *Colson v. Grohman* provide an alternative ground to support the decision below?

4. Doesn't Rule 13 of the Texas Rules of Civil Procedure comply with the requirements of the *Parratt/Hudson* Doctrine so that Finlan cannot assert claims under § 1983?

5. Can Finlan claim that the filing of the DISD's September 13, 1995 lawsuit against him was in retaliation for the exercise of his First Amendment rights when the Texas Court has concluded that machinations between Finlan, Ed Grant and others in the "162nd civil rights suit" are the "basis" for the DISD lawsuit?

6. Should Finlan be allowed to relitigate in this cause claims he has already unsuccessfully asserted in other lawsuits?

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ANNOTATION, ACTIONABILITY OF MALICIOUS PROSECUTION UNDER 42 USCS § 1983, 79 A.L.R. Fed. 896 (1986) 9

I. SCHOOL DISTRICT NOT A RESPONDENT

Finlan's Petition for Certiorari incorrectly includes the Dallas Independent School District (the "DISD") as a party which prevailed against Finlan in the court below. The DISD's Summary Judgment Motion was based solely on the Eleventh Amendment. The trial court's grant of summary judgment to the DISD was reversed and remanded. *Dallas Ind. Sch. Dist. v. Finlan*, 27 S.W.3d 220, 240-44 (Tex. App. – Dallas 2000) (pp. 37-38 of Finlan's Appendix)

II. THE PETITION SHOULD BE DISMISSED FOR LACK OF JURISDICTION

A. Judgment Based On Independent And Adequate State Grounds.

The judgment of the court below is based on independent and adequate state grounds; therefore this Court lacks jurisdiction. *E.g., Black v. Cutter Laboratories*, 351 U.S. 292, 297-98 (1956); *Herb v. Pitcairn*, 325 U.S. 117, 125 (1945). When the DISD sued Finlan, et al. in September 1995, Finlan quickly filed his § 1983 counterclaim charging that the suit was filed in retaliation for his exercise of First Amendment rights.

The court below not only held Finlan's rights had not been violated by the filing of the lawsuit (27 S.W.3d at 240-44), it also found the DISD had probable cause to make the filing and reversed the trial court's summary judgment in Finlan's favor:

> We conclude DISD's evidence raises fact questions concerning the alleged agreement among

> Finlan, Venable, and Grant to defraud DISD by obtaining consent judgments against DISD regardless of the merits of Finlan's and Venable's civil rights suit in the 162nd District Court and to collect the judgments from the TASB.

Id. at 232.

Every lawsuit, except those in the nature of a declaratory judgment action, can be said to be filed in retaliation for something or other. Here is a state court's conclusory finding that the retaliatory motive of the DISD in initiating the September 1995 lawsuit was not because Finlan was a First Amendment pest but because he was trying to pick the DISD's pocket.

And, how was that determination made? By the due process of law.

B. Certiorari Is Sought To Wrong Court.

It is the opinion of the Fifth District Court of Appeals at Dallas that Finlan challenges here. After that opinion was rendered, Finlan filed a Petition for Review with the Texas Supreme Court, which was denied. Rule 56.1(a) of the Texas Rules of Appellate Procedure, "Consideration in Granting Review" when a petition for review is filed, reads as follows: "Whether to grant review is a matter of judicial discretion." The final judgment subject to review here is that of the Court of Appeals; Finlan has sought review of the discretionary decision of the Texas Supreme Court denying his Petition for Review. His Petition here should be denied for want of jurisdiction. *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954).

III. FEDERAL STATUTE INVOLVED: SECTION 1983

Finlan's action below was predicated upon an asserted violation of 42 U.S.C. § 1983, not on a direct violation of the First Amendment. Section 1983 provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

IV. STATEMENT OF THE CASE

The DISD Respondents object to the "Statement of the Case" in the Petition. In the early '90s, Finlan did make a number of allegations of improprieties concerning the DISD's handling of its bond funds. And, along with his then cohort, Don Venable, did file a lawsuit based on those allegations. This led to the appointment of the Texas Commissioner of Education as Master and his hiring of Deloitte & Touche. The accounting firm's report did reveal shortcomings in the DISD's accounting records, but nothing like the massive frauds asserted by Finlan.

We adopt the "Background" section of the Opinion of the court below found at 27 S.W.3d at 230 (pp. 12-13 of Finlan's Appendix), from which we glean the following:

a. The DISD sued Finlan and Venable in October 1992 "for tortious interference with the relationship and contract between the board

and Goldman, Sachs & Company." Thus, such filing was not a retaliatory lawsuit predicated on Finlan's protected First Amendment actions, as the Petition claims.

b. In "response to" the "tortious interference suit" Finlan and Venable filed (i) a civil rights counterclaim in that lawsuit, and (ii) in 1994, filed the "162nd civil rights suit."

c. Ed Grant who had been a DISD Trustee and was named as a counterdefendant in the "tortious interference suit" and as a defendant in the "162nd civil rights suit" confessed judgment on the § 1983 claims of Finlan, retained Venable's lawyer, Ron Hinds, to represent him in a crossclaim against the DISD lawyers who had advised that the "tortious interference suit" be filed and, together with Finlan, "presented an agreed judgment in favor of Finlan for $300,000 to the judge who signed it."

d. The "events" in the "162nd civil rights suit" were the "basis for the DISD's civil conspiracy claims" before the Court of Appeals.

What was not in the record before the court below was what happened to these counterclaims in the "tortious interference lawsuit" and to Finlan's and Venable's claims in the "162nd civil rights suit." After the DISD's petition was dismissed, the parties to the 1992 litigation were realigned with the counterclaimants becoming plaintiffs. The "162nd civil rights suit" was consolidated with the 1992 suit which was then pending in the 101st Judicial District Court (see DISD Respondents' Appendix 1). Summary Judgment was granted to the DISD and the

DISD Respondents on Finlan's and Venable's § 1983 claims by Order dated July 26, 1999. (Appendix 2) On June 19, 2000, Final Judgment was entered confirming the earlier grant of summary judgment and granting summary judgment to the lawyer defendants. (Appendix 6) Finlan has perfected an appeal which pends before the Eleventh Court of Appeals, Eastland, Texas.

On page 6 of the Petition, Finlan tells of his request to School Superintendent Woolery to provide copies of campaign finance information of the School Board Members. This resulted in the DISD's filing on September 6, 1995 of a declaratory judgment suit against him and Venable, who had made a similar demand. This filing, of course, drew a § 1983 counterclaim by Finlan which was expanded to, and incorporated within, the counterclaim claiming a violation of § 1983 by the September 13, 1995 filing of the RICO, etc. lawsuit, which was the basis of Finlan's claim in the court below.

Venable filed a separate lawsuit in federal court claiming that the September 6th filing violated § 1983. After summary judgment was granted to the defendants (Appendix 11), Venable did not pursue his claims relating to the September 6th filing. He did appeal another asserted § 1983 violation relating to a bond forfeiture proceeding. The Fifth Circuit, in a per curiam opinion, found that this appeal "is without arguable merit and is frivolous" and ordered it dismissed. (Appendix 17)

Another related lawsuit began with the filing in 1994 by Finlan and Venable of a declaratory judgment action against William Keever, then a DISD Trustee, seeking his campaign finance records. Keever filed a declaratory

judgment counterclaim that those records were not covered by the Open Records Act. This counterclaim provoked § 1983 counterclaims against Keever and his lawyers by Finlan and Venable, which were removed to federal court. After summary judgment was granted to the defendants, Finlan perfected an appeal to the Fifth Circuit which found that his appeal "is without arguable merit and is frivolous" and ordered it dismissed. (Appendix 19)

So, Finlan's claims here did not grow out of a history of oppression, retaliation, and civil rights violations by the DISD and the DISD Respondents as is asserted in the Petition. Rather, Finlan's claims here are just one in a series of "frivolous," "meritless" § 1983 claims by Finlan.

V. FINLAN HAS NOT ALLEGED A DEPRIVATION OF A CONSTITUTIONAL RIGHT

Baker v. McCollan teaches that

> The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right "secured by the Constitution and laws." If there has been no such deprivation, the state of mind of the defendant is wholly immaterial.

443 U.S. 137, 140 (1979) With Finlan retaliation is automatically a deprivation and state of mind is of central importance, not wholly immaterial.

The court below held that there was no violation of § 1983 committed by the filing of the civil lawsuit. 27 S.W.3d 220, 244 (Tex. App. – Dallas 2000) ("We have held

the filing of the civil case was not a constitutional violation.") There is no real or intolerable conflict between the decision below on that issue and any of the decisions of this Court discussed, quoted or cited in the Petition.

There is one decision of this Court – *Albright v. Oliver*, 510 U.S. 266 (1994) – that is on point, but not in conflict; the decision below is completely compatible with *Albright* and is, moreover, through its reliance on *Johnson v. Louisiana Dep't of Agriculture*, 18 F.3d 318 (5th Cir. 1994) derived from *Albright*.

Albright is not a case cited in Finlan's Petition.

Petitioner's claim in *Albright*, according to the plurality opinion, was that "the action of respondents infringed his substantive due process right to be free of prosecution without probable cause." (510 U.S. at 271) Here, Finlan's main claim is that the action of Respondents violated his "substantive Fourteenth Amendment rights" (Petition p. 19) by the filing of the civil claims – regardless of whether or not there was probable cause. Obviously the four members of the *Albright* plurality are not going to extend "the protections of substantive due process" to Finlan's complaints about a civil proceeding. (*Id.* at 271-72)

Justice Scalia, concurring, "reject(s) the proposition that the Due Process clause guarantees certain unspecified liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty." (*Id.* at 275) By so doing, he rejects Finlan's claim here. Justice Ginsburg agreed that Albright's claim is "properly analyzed under the Fourth Amendment rather than under the heading of substantive due process." (*Id.*

at 276) Further, there was not a seizure of Finlan here as there was of Albright, which made the difference between her analysis and that of the plurality. Justice Kennedy's concurrence – joined by Justice Thomas – agrees that Albright's claim "must be analyzed under the Fourth Amendment without reference to more general considerations of due process." (*Id.* at 281) Justice Souter also agreed that "petitioner has not justified recognition of a substantive due process violation in his prosecution without probable cause." (*Id.* at 286) Lastly, Justice Stevens' dissent – in which Justice Blackburn joined – provides no solace to Finlan in that its analysis is derivative of the principle that "The Fifth Amendment to the Constitution constrains the power of the Federal Government to accuse a citizen of an infamous crime." (*Id.* at 291)

In summary, Finlan can find no support in any of the *Albright* opinions for his claim of a violation of substantive due process. Worse for him, the plurality and concurring opinions are fatal to his position.

At the Circuit level, there are a number of cases that hold that there is no violation of § 1983 presented by the filing of a civil lawsuit or counterclaim. Among other Fifth Circuit opinions finding no violation of § 1983 in the filing of civil litigation by a governmental entity are *Whittington v. Johnston*, 201 F.2d 810 (5th Cir. 1953); *Curry v. Ragan*, 257 F.2d 449 (5th Cir.), *cert. den.*, 35 U.S. 851 and *reh. den.* 358 U.S. 914 (1958); *Beker Phosphate Corp. v. Muirhead*, 581 F.2d 1187 (5th Cir. 1978); *Whatley v. Philo*, 817 F.2d 19 (5th Cir. 1987); and, of course, *Johnson v. Louisiana Dep't of Agriculture*, 18 F.3d 318 (5th Cir. 1994).

Among other circuits that have reached a similar conclusion that the filing of a civil lawsuit does not implicate § 1983 are *Moffett v. Commerce Trust Co.*, 187 F.2d 242 (8th Cir. 1951); *Bell v. School Bd. of City of Norfolk*, 734 F.2d 155 (4th Cir. 1984); *Paskaly v. Seale*, 506 F.2d 1209 (9th Cir. 1974); *Bottone v. Lindsley*, 170 F.2d 705 (10th Cir. 1948). *See also Bradford v. Lefkowitz*, 240 F. Supp. 969, 977 (S.D.N.Y. 1965) ("Neither the Fourteenth Amendment nor the Civil Rights Act purports to secure a person against unfounded or even malicious claims or suits in state courts, especially when the laws and courts of the state are available and furnish adequate remedies to a person aggrieved."). *See generally* ANNOTATION, ACTIONABILITY OF MALICIOUS PROSECUTION UNDER 42 USCS § 1983, 79 A.L.R. Fed. 896 (1986).

Of the score or more Circuit cases cited by the Petition, only three – not counting *Johnson v. LDOA* – were concerned with malicious prosecution issues. In *Harrison v. Springdale Water & Sewer Comm.*, 780 F.2d 1422 (8th Cir. 1986) the counterclaim by the government actors sought to condemn Harrison's property; a recorded *lis pendens* accompanied the filing of the lawsuit. As the Eighth Circuit observed:

> The real gist of the Harrisons' complaint is found in the statement that "if public officials are allowed to use that power [of eminent domain] to punish those who seek protection in the courts, then the courts and justice will be denied to many citizens."

(*Id.* at 1428) In contrast to the situation here, the condemnation suit in *Harrison* worked a deprivation of property which was undertaken for the admitted purpose of coercing a sale of the property at the city's price. This decision

predates *Albright*. The issue before the Second Circuit in the second case, *Greenwich Citizens Comm. v. Counties of Warren*, 77 F.3d 26 (2nd Cir. 1996), was whether the trial court erred in not requiring a finding that either (a) the counterclaims were filed in "retaliation" for exercise of First Amendment rights or (b) were filed as "a legitimate response to litigation." (p. 31) That opinion was predicated on the assumption that a § 1983 violation could be based on the filing of a civil lawsuit by government actors; it never tested or addressed the correctness of such assumption. Although decided subsequently to *Albright*, it nowhere cites or considers *Albright*. The third case, *Rolf v. City of San Antonio*, 77 F.3d 823 (5th Cir. 1996) was similar to *Harrison* in that condemnation of plaintiff's land was sought – a deprivation of a property interest. Neither was *Albright* cited in *Rolf*. Under the Fifth Circuit's intra-circuit stare decisis rule, the *Rolf* panel was bound by *Johnson v. LDOA;* obviously the condemnation element of *Rolf* distinguished it from both *Albright* and *Johnson v. LDOA*.

The case most clearly on point is the case most relied upon by the court below, *Johnson v. LDOA*[1]. The Fifth Circuit opinion followed soon after this Court had handed down *Albright*. There, Johnson claimed that retaliatory administrative actions were lodged against him for

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[1] The Sixth Circuit's decision in *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 1997), *cert. den.*, 523 U.S. 1094 (1998) is in complete accord with *Johnson v. LDOA*. There, the court reversed the denial of summary judgment on qualified immunity grounds after finding that no reasonable official would have believed he was violating clearly established rights by the filing of a retaliatory lawsuit.

not making "a large enough contribution" to the Commissioner's reelection campaign and that there were "coercive attempts to stifle him in his free expression of speech." (18 F.3d 320) The Court agreed with the district court that, if there were a § 1983 claim asserted, it was "one for malicious prosecution in violation of Johnson's First Amendment rights." *Id.* It immediately adds, "Whether the Constitution comprehends any such claim is far from clear." The court made clear (*Id.* at 321, fn. 2) that prior to *Albright*, the Fifth Circuit had generally held malicious prosecution in criminal proceedings were "serious enough" to be actionable under § 1983 but not those in civil proceedings. Finlan attempts to distinguish *Johnson v. LDOA* by arguing that the claims of civil malicious prosecution are more serious than are criminal malicious prosecutions.

Finlan to the contrary, for an administrative proceeding which resulted in sanctions and, *a fortiori*, for a purely civil action, the Fifth Circuit requires that, "at the very least" a § 1983 claimant must "establish all elements of the common law tort action." (*Id.* at 320) The court below's reversal of summary judgment for Finlan on the civil conspiracy claim (28 S.W.3d at 229-32) established probable cause and negated one essential element of Finlan's malicious prosecution cause of action. More importantly for the "deprivation" requirement of § 1983, Finlan fails to allege facts to establish a second element of a common law malicious prosecution claim, that of special damage or special injury through some physical interference with the party's person or property in the form of an arrest, attachment, injunction or sequestration. *See Texas Beef & Cattle Co. v. Green*, 921 S.W.2d 203, 209 (Tex. 1996)

Johnson v. LDOA was the first in what is an ever-expanding universe of circuit cases attempting to apply *Albright* to § 1983 claims bottomed on an alleged malicious prosecution. There is conflict and confusion among the Circuits, but not such that in any way conflicts with the decision below. Some, like *Johnson v. LDOA* and the court below, require that all of the elements of a common law malicious prosecution claim must be established.[2] Others require establishing such elements – and more.[3] But all hold that, unless a lack of probable cause can be established[4] and unless there was a "seizure,"[5] there can be no § 1983 cause of action. Finlan's § 1983 claims do not contain either the seizure element or the lack of probable cause element.

There is no conflict between the opinion below and any decision of this Court or of any circuit court of appeals on Finlan's central claim of a violation of substantive due process because, as the court below, summarizing *Johnson v. LDOA* found

> . . . there is no clearly established right to claim a First Amendment violation from the filing of a civil lawsuit, even one alleged to be malicious

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[2] *E.g., Cervanates v. Jones*, 188 F.3d 805, 808-09 (7th Cir. 1999), *cert. den.*, ___ U.S. ___, 145 L.Ed.2d 1071 (2000).

[3] *E.g., Lambert v. Williams*, 223 F.3d 257, 261 (4th Cir. 2000), *cert. den.*, ___ U.S. ___ 148 L.Ed.2d 797 (2001).

[4] *E.g., Taylor v. Meacham*, 82 F.3d 1556, 1561-62 (10th Cir. 1996).

[5] *E.g., Britton v. Maloney*, 196 F.3d 24, 29 (1st Cir. 1999), *cert. den.*, ___ U.S. ___, 147 L.Ed.2d 234 (2000).

> prosecution in retaliation for the exercise of free speech rights.

27 S.W.3d at 244.

The court below was also correct in its consideration and application of relevant Fifth Circuit authorities to Finlan's claim that his right to access the courts had been illegally infringed upon. The court correctly cited and quoted *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 (5th Cir. 1994) for the proposition that such right of access is implicated "where the ability to file suit was delayed, or blocked altogether." 27 S.W.3d at 244 And, likewise with respect to *Hale v. Townley*, 45 F.3d 914, 920 (5th Cir. 1995) to the effect that government's filing of civil suit is not an "official impediment" to the "facilitative right to institute a suit." *Id.*

Further support for the court below can also be found in *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989), *cert. den.*, 496 U.S. 924 (1990). There, the court was asked to adopt the Eighth Circuit's holding in *Harrison v. Springdale Water & Sewer Comm.*, cited *supra*, that the filing of the retaliatory counterclaim stated a cause of action for infringement of the constitutional right of access to the courts. The Fifth Circuit expressly declined to approve or disapprove such holding. 884 F.2d at 812-13 fn.9 Therefore, it has not been established in Fifth Circuit jurisprudence that there exists a constitutional right of access to the courts as Finlan would frame such right.

The court below is eminently correct in its holding that "the filing of the civil case was not a constitutional violation. . . . " 27 S.W.3d at 244

VI. RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY

The court below correctly applied controlling federal precedents to analyze Respondents' Qualified Immunity defense. It correctly took the first step in the "sequential two-step inquiry" mandated by this Court in *Siegert v. Gilley*, 500 U.S. 226, 231 (1991) and by the Fifth Circuit in *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997) and elsewhere. It correctly looked to *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) and to *Foster v. City of Lake Jackson*, cited *supra*, to determine what "clearly established" means. That step ended with the correct conclusion that the conduct complained of here did not violate any clearly established constitutional right. If there were any uncertainty about the "clearly established" requirement, we need look no further than Judge Jones's concurring opinion in *Kerr v. Lyford*, 171 F.3d 330, 342-43 (5th Cir. 1999).

Having firmly and flatly taken the first step, the Court need not take the second step to end its inquiry. The DISD Respondents were correctly determined to be entitled to the Qualified Immunity defense. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)

VII. *PAUL V. DAVIS* AND *COLSON V. GROHMAN* PROVIDE ALTERNATIVE GROUNDS OF SUPPORT FOR THE OPINION BELOW

This Court in *Paul v. Davis*, 424 U.S. 693 (1976) rejected a § 1983 claim based on the distribution of flyers by the police which had plaintiff's picture on them and identified him as a shoplifter when he had been arrested,

but not prosecuted, for such crimes. In essence, *Paul v. Davis* held that, without more, injury to reputation does not implicate a protected liberty or property interest. Such "reputational damages" are all the injury that Finlan asserts here. Other courts have recognized that the mere filing of a lawsuit is not essentially different from the "reputational damages" visited by the defamation of a false acquisition. Particularly, the Seventh Circuit.

Before *Albright v. Oliver* reached this Court, it was before the Seventh Circuit which remarked upon the similarities of the damages inflicted by defamation and a malicious prosecution:

> The medley of harms that a malicious prosecution inflicts when, as in this case, the defendant is exonerated before any punishment that is imposed – indeed before he is even put on trial – is similar to that inflicted by defamation, which by impairing a person's reputation not only embarrasses and even outrages him but also undermines his ability to make favorable transactions, whether business or personal, thereby subjecting him to costs pecuniary and nonpecuniary or both. It also puts him to the expense of bringing a suit for defamation to recover his good name. If the injuries that defamation imposes do not constitute a deprivation of liberty or property within the meaning of the due process clause, then neither do the injuries that malicious prosecution imposes.

Albright v. Oliver, 975 F.3d 343, 345-46 (7th Cir. 1992)

Subsequent to this Court's affirmance of *Albright*, the Seventh Circuit was faced with another § 1983 claim where there had been "no arrest or other seizure of the

defendant." *Smith v. Bd. of Trustees of University of Illinois*, 34 F.3d 432, 434 (7th Cir. 1994). Gleaning from *Albright* that the only constitutional remedy was under the Fourth Amendment (via the Fourteenth) the court reasons:

> If liberty is not at stake, it is difficult to see how either tort [malicious prosecution or the use of process] could be thought to invade an interest protected by the due process clause (life, liberty, property) merely by virtue of its effect upon the reputation, or, like any suit, the pocketbook of the defendant. Defamation is not actionable in such circumstances, because reputation is not property within the meaning of the due process clause. . . . How torts so closely related to defamation in the interest that they invade as a malicious prosecution and abuse of process could be thought to deprive a defendant of property mystifies us.
>
> *Id.*

In a later Seventh Circuit case, *Spiegel v. Rabionovitz*, 121 F.3d 251 (7th Cir. 1997), the plaintiff claimed § 1983 damages due to his eviction, his adverse employment status and loss of income. The district court found that Spiegel's eviction was a probable consequence of his malicious prosecution. The Seventh Circuit disagreed and reversed:

> Although Spiegel's circumstances were unfortunate, the rationale of *Smart* instructs that none of them are deprivations of property of a constitutional magnitude.

Id. at 256 Finlan's nearly identical damages are likewise not deprivations.

The Fifth Circuit's opinion in *Colson v. Grohman*, 174 F.3d 498 (5th Cir. 1999) is likewise fatal to Finlan's § 1983 claims. Finlan's claims here are

> . . . inconsistent with our recent case law unequivocally holding that retaliatory criticisms, investigations, and false acquisitions that do not lead to more tangible adverse action are not actionable under § 1983.

Id. at 513. The "recent case law" and sole authority cited in support of that statement in the accompanying footnote 8 is *Johnson v. LDOA*, which is said to be "consistent with our general rule that the plaintiff must cross a certain threshold of harm before she can bring a claim for First Amendment retaliation." *Id.* The opinion concludes that Colson "has not alleged any First Amendment *deprivation* actionable under § 1983." (*Id.* at 514 – emphasis supplied) Citing *Paul v. Davis*, the opinion further concludes that there was no infringement as to "her Fourteenth Amendment due process claim" – described as resting "on a theory that she suffered harm to her reputation coupled with the denial of her constitutional rights to be without retaliation." *Id.* Finlan is in no better or different position from that of Colson. He is not entitled to a recovery under § 1983.

VIII. ANOTHER SUPPORTING AUTHORITY: THE *PARRATT/HUDSON* DOCTRINE

Rule 13 of the Texas Rules of Civil Procedure[6] is the state law analogue of Rule 11 of the Federal Rules of Civil

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[6] Rule 13 provides, in relevant part:

> The signatures of attorneys or parties constitute a certificate by them that they have read the pleading,

Procedure. Through it, Texas has provided a process through which Finlan could seek to have the injury occasioned to him by the DISD's filing of the lawsuit in question redressed.

Finlan's characterization of the September 19, 1995 filing as being in retaliation for his exercise of First Amendment rights fits snugly within Rule 13's prescribed filings that are (a) "groundless" and (b) either i) "brought in bad faith" or ii) "brought for the purpose of harassment." The monetary sanctions imposed can be as high as necessary to accomplish the rules intendment. *Bradt v. Sebek*, 14 S.W.2d 756 (Tex. App. – Houston [1st Dist.] 2000 – PDE), *cert. den.*, ___ U.S. ___, 149 L.Ed.2d 138 (2001). Another court of appeals has found "particularly applicable" in deciding Rule 13 motions the following:

1) the nature and extent of prejudice, apart from out-of-pocket expenses, suffered by

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motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both.

> the offended person as a result of the misconduct;
>
> 2) the impact of the sanction on the offender, including the offender's ability to pay a monetary sanction;
>
> 3) the impact of the sanction on the offended party, including the offended person's need for compensation;
>
> 4) the relative magnitude of sanction necessary to achieve the goal or goals of the sanction; [and]
>
> 5) burdens of the court system attributable to the misconduct, including consumption of judicial time and incurrence of . . . other court costs.

Hawkins v. Estate of Volkmann 898 S.W.2d 334, 339 (Tex. App. – San Antonio 1995 – writ den). Rule 13 clearly meets the *Parratt/Hudson* requirement of a state-provided adequate post-deprivation remedy.

The other *Parratt/Hudson* requirement is that the deprivation be random and unauthorized. The best criteria we know of for determining what conduct is random and unauthorized was laid down by the late Judge John Minor Wisdom in *Charbonnet v. Lee,* 951 F.2d 638, 644 (5th Cir. 1992): "[B]ecause the State has instituted a policy forbidding such conduct." Rule 13 is such a policy.

The *Parratt/Hudson* doctrine provides yet one more reason why Finlan's writ should be denied.

IX. CONCLUSION

Over the many years and the many lawsuits, Finlan has floated more than a few constitutional theories of recovery, mostly Due Process but, every now and then, Equal Protection as well.

Here, Finlan seeks Unequal Protection. In essence he is saying that, since he has been so free and so frequent in his speech, he is not to be treated like his listeners, his fellow citizens. Nor can he be made to answer in a state court of law as to whether or not he is involved in a scheme to bilk hundred of thousands of dollars from a state entity without that entity's incurring § 1983 liability. Finlan is wrong: Section 1983 was meant to provide a remedy for the wronged, not a sanctuary for the wrongdoer.

The DISD Respondents respectfully request that this Court note its lack of jurisdiction and dismiss Finlan's Petition.

Respectfully submitted,

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No. 92-12023-E

DON VENABLE and RICHARD E. FINLAN, et al.,	§	IN THE DISTRICT
	§	COURT OF
	§	DALLAS COUNTY,
Plaintiffs,	§	TEXAS
v.	§	101ST JUDICIAL
	§	DISTRICT
DALLAS INDEPENDENT SCHOOL DISTRICT,	§	
	§	
Defendant.	§	

ORDER GRANTING DISD'S MOTION TO TRANSFER

Came on to [sic] heard DISD's Motion to Transfer filed on January 29, 1999 and seeking the transfer into this Court for consolidation with the above-referenced cause the case of *Don Venable et al. v. Sandy Kress, et al.*, Cause No. 94-09418-I, in the 162nd Judicial District Court, Dallas County, Texas. Such transfer was sought pursuant to Rule 1.1(f)(2) of the Dallas Civil District Court Rules. Having considered the Motion and the Opposition, the Court is of the opinion that such Motion should be granted. It is therefore ORDERED that Cause No. 94-09418-I, presently pending in the 162nd District Court, Dallas County, Texas be transferred into this Court and consolidated with Cause No. 92-12023-E.

SIGNED this 19th of March 1999.

/s/ Jay Patterson, Jr.
JUDGE PRESIDING

NO. 92-12023-E

DON VENABLE and RICHARD E. FINLAN, et al.,	§	**IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS**
Plaintiffs,	§	
v.	§	**101st JUDICIAL DISTRICT**
DALLAS INDEPENDENT SCHOOL DISTRICT, SANDY KRESS, SCHWARTZ & EICHELBAUM, P.C., LEONARD J. SCHWARTZ, DENNIS J. EICHELBAUM, MARVIN EDWARDS, RENE CASTILLA, TRINI GARZA, DAN PEAVY, HOLLIS BRASHEAR, KATHLYN GILLIAM, and YVONNE EWELL	§	
Defendants.	§	

ORDER

Before this Court are various Motions for Summary Judgment filed by Plaintiffs Don Venable, Richard Finlan, and David Venable, Defendant Dallas Independent School District ("DISD"), and Defendants Sandy Kress, Marvin Edwards, Rene Castilla, Trini Garza, Hollis Brashear, Kathlyn Gilliam, and Yvonne Ewell (the "DISD Defendants"). The Motions are as follows:

1. Motion for Summary Judgment (filed by Plaintiff Finlan on or about December 23,

1998 and joined by Plaintiffs Don Venable and David Venable on or about January 6, 1999)

2. Motion for Partial Summary Judgment (filed by Plaintiff Don Venable on or about January 28, 1999 and joined by Plaintiff Richard Finlan on or about February 22, 1999 and Plaintiff David Venable on or about February 25, 1999)

3. Amended Motion for Partial Summary Judgment (filed by Plaintiff Don Venable on or about February 22, 1999)

4. Motion for Partial Summary Judgment (filed by Plaintiff Don Venable on or about March 30, 1999)

5. Second Motion for Partial Summary Judgment against Sandy Kress, Schwartz & Eichelbaum, P.C., Leonard Schwartz, Dennis J. Eichelbaum, Marvin Edwards, Rene Castilla, Trini Garza, Hollis Brashear, Kathlyn Gilliam, and Yvonne Ewell (filed by Plaintiff Finlan on or about March 30, 1999)

6. Motion for Summary Judgment on Qualified and Official Immunity Grounds (filed by the DISD Defendants on or about April 13, 1999)

7. Motion for Summary Judgment Based on Absolute Legislative Immunity (filed by the DISD Defendants, except Defendant Marvin Edwards, on or about April 14, 1999)

8. No-Evidence Motion for Summary Judgment Against Sandy Kress, Marvin Edwards, Rene Castilla, Trini Garza, Hollis

Brashear, Kathlyn Gilliam, and Yvonne Ewell's Affirmative Defense of Immunity (filed by Plaintiff Finlan on or about May 20, 1999)

9. Motion for Partial Summary Judgment Against Sandy Kress, Marvin Edwards, Rene Castilla, Trini Garza, Hollis Brashear, Kathlyn Gilliam, Yvonne Ewell and Dallas Independent School District (filed by Plaintiff Finlan on or about May 20, 1999)

10. Motion for Summary Judgment (filed by DISD and the DISD Defendants on or about May 21, 1999)

11. Motion for Partial Summary Judgment Against Non-Lawyer Defendants (filed by Plaintiff David Venable on or about May 21, 1999)

12. Motion for Partial Summary Judgment and Brief in Support (filed by Plaintiff Don Venable on or about May 21, 1999)

On June 17, 1999, this Court heard argument from counsel and parties (if not represented by counsel) and is of the opinion that DISD and the DISD Defendants' Motions should be granted and that Plaintiffs' Motions should be denied. Accordingly,

It is ORDERED, ADJUDGED, and DECREED that the Motion for Summary Judgment of the DISD and DISD Defendants (#10) is GRANTED.

It is further ORDERED, ADJUDGED, and DECREED that the DISD Defendants' Motion for Summary Judgment on qualified and Official Immunity Grounds (#6) is GRANTED.

It is further ORDERED, ADJUDGED, and DECREED that Motion for Summary Judgment Based on Absolute Legislative Immunity of the DISD Defendants (except Marvin Edwards) (#7) is DENIED as MOOT.

It is further ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motions for Summary Judgment as they relate to DISD or the DISD Defendants (#s 1-5, 8-9, 11-12) are DENIED.

It is further ORDERED, ADJUDGED, and DECREED that all objections to summary judgment evidence are OVERRULED.

Any further relief sought by Plaintiffs against the DISD or the DISD Defendants not expressly granted herein is denied.

SIGNED this 26th day of July 1999.

/s/ Jay Patterson, Jr.
JUDGE PRESIDING

CAUSE NO. 92-12023-E

DON VENABLE and RICHARD E. FINLAN, et al.,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	DALLAS COUNTY, TEXAS
v	§	
DALLAS INDEPENDENT SCHOOL DISTRICT, et al.,	§	101ST JUDICIAL DISTRICT
Defendants.	§	

~~ORDER~~ [FINAL JUDGMENT]

On October 7, 1999, came on to be heard various motions for summary judgment filed by Plaintiffs Don Venable, Richard Finlan, and David Venable ("Plaintiffs"), Cross-Plaintiff Ed Grant ("Cross-Plaintiff"), and Defendants Dennis J. Eichelbaum, Leonard J. Schwartz, and Schwartz & Eichelbaum, P.C. ("S&E Defendants"). The motions heard are as follows:

A. Motions filed by Plaintiffs Don Venable, Richard Finlan, and David Venable and Cross-Plaintiff Ed Grant ("Plaintiffs' and Cross-Plaintiff's Motions").

   1. Motion for Partial Summary Judgment (filed by Plaintiff Don Venable on or about March 30, 1999).

   2. Second Motion for Partial Summary Judgment Against Sandy Kress, Schwartz & Eichelbaum, P.C., Leonard Schwartz, Dennis J. Eichelbaum, Marvin Edwards, René Castilla, Trini Garza, Hollis Brashear, Kathlyn Gilliam, and Yvonne Ewell (filed by Plaintiff Richard Finlan on or about March 30, 1999).

3. Motion for Partial Summary Judgment and Brief in Support (filed by Plaintiff Don Venable on or about May 21, 1999).

4. Motion for Partial Summary Judgment Against Dennis Eichelbaum, Leonard Schwartz, and Schwartz & Eichelbaum, P.C. (filed by Plaintiff Richard Finlan on or about June 24, 1999).

5. Motion for Partial Summary Judgment Against Cross-Defendants (filed by Cross-Plaintiff Ed Grant on or about June 25, 1999).

B. Motions filed by Defendants Dennis J. Eichelbaum, Leonard J. Schwartz, and Schwartz & Eichelbaum, P.C. ("S&E Defendants' Motions").

1. Motion for Summary Judgment (filed by S&E Defendants on or about June 25, 1999)

2. Amended Motion for Summary Judgment Based on Immunity Grounds (filed by S&E Defendants on or about June 25, 1999).

3. Motion for Summary Judgment Regarding Ed Grant's Cross Action for Indemnity (filed by S&E Defendants on or about June 25, 1999).

4. Supplemental Motion for Summary Judgment (filed by S&E Defendants on or about August 23, 1999).

The Court, at a previous hearing on September 14, 1999, granted the S&E Defendants' Motion for Leave to File Supplemental Motion for Summary Judgment (filed August 23, 1999).

On November 17, 1999, came on to be heard the following motions filed by the S&E Defendants:

1. Second Supplemental Motion for Summary Judgment (filed by S&E Defendants on or about October 15, 1999).

2. Supplemental Motion for Summary Judgment (re-filed by S&E Defendants on or about October 22, 1999)[1].

The Court granted the S&E Defendants' Motion for Leave to File Second Supplemental Motion for Summary Judgment at the October 7, 1999 hearing. The Court has further considered the parties' objections to the summary judgment evidence and has invited the parties to submit a separate order setting forth the Court's rulings thereon.

After hearing argument from counsel and parties (if not represented by counsel) on October 7, 1999 and November 17, 1999; after examining the pleadings timely filed; after considering the Plaintiffs' and Cross-Plaintiff's Motions, the S&E Defendants' Motions, and the parties' responses and replies thereto; and after considering the evidence and record properly before it, the Court concluded, and so ordered, that: (1) the S&E Defendants' Motion for Summary Judgment (filed 6/25/99) be GRANTED; (2) [cross plaintiff Ed Grant's Motion for Coutirenence was DENIED and] the S&E Defendants' Motion for Summary Judgment Regarding Ed Grant's Cross-Action for Indemnity (filed 6/25/99) be GRANTED; (3) the S&E Defendants' Amended Motion

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[1] THE S&E Defendants resubmitted and reset for hearing this Motion originally heard October 7, 1999, in response to objections by Plaintiffs regarding notice. Assuming arguendo that Plaintiff's objections were otherwise valid (which Defendants deny), this resubmission cured Plaintiffs' objections.

for Summary Judgment on Immunity Grounds (filed 6/25/99) be DENIED; and (4) the S&E Defendants' Supplemental Motion for Summary Judgment (filed 8/23/99 and re-filed 10/2299) be GRANTED, except as to immunity grounds, which are hereby DENIED; and (5) the S&E Defendants' Second Supplemental Motion for Summary Judgment (filed 10/15/99) be GRANTED, except as to immunity grounds, which are hereby DENIED; and (6) the Plaintiffs' and Cross-Plaintiff's Motions be DENIED. Accordingly,

IT IS ORDERED, ADJUDGED and DECREED that Plaintiff David Venable take nothing against Defendants Dennis J. Eichelbaum, Leonard J. Schwartz, and Schwartz & Eichelbaum, P.C.

IT IS ORDERED, ADJUDGED and DECREED that Plaintiff Richard Finlan take nothing against Defendants Dennis J. Eichelbaum, Leonard J. Schwartz, and Schwartz & Eichelbaum, P.C.

IT IS ORDERED, ADJUDGED and DECREED that Plaintiff Don Venable take nothing against Defendants Dennis J. Eichelbaum, Leonard J. Schwartz, and Schwartz & Eichelbaum, P.C.

IT IS ORDERED, ADJUDGED and DECREED that Cross-Plaintiff Ed Grant take nothing against Defendants Dennis J. Eichelbaum, Leonard J. Schwartz, and Schwartz & Eichelbaum, P.C.

This judgment is intended to be a final and appealable judgment, disposing of all claims and parties to this cause. IT IS THEREFORE ORDERED, ADJUDGED and DECREED that all relief not expressly granted in this

judgment, [in favor of the S&E Defendants or in] ~~and~~ any other judgment or order which has granted the DISD Defendants summary judgment relief that Plaintiff(s) take nothing, is hereby denied[, unless express granted or denied by previous written order. Costs shall be assessed against the party incurring same.]

SIGNED this 19th day of June, 2000.

/s/ Jay Patterson, Jr.
JUDGE PRESIDING

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DON VENABLE Plaintiff, v. HOLLIS BRASHEAR, et al., Defendants.	§ § § § § § §	CIVIL ACTION NO. 3:97-CV-2187-P

ORDER

(Filed Jan. 24, 2000)

This is a civil rights suit filed by plaintiff, Don Venable ("Venable") or "plaintiff") against the Dallas Independent School District ("DISD"), several DISD trustees, and attorneys of the DISD. Venable alleges claims pursuant to 42 U.S.C. § 1983 for violations of his First Amendment right of free access to the courts and state law claims of malicious prosecution and civil conspiracy. The court granted summary judgment in favor of all of the defendants by order filed on September 30, 1999. A final judgment denying Venable any relief from his claims was also filed on September 30, 1999. Presently before the court are Venable's motion for reconsideration filed October 29, 1999 and Amended Motion for Reconsideration filed November 15, 1999; the DISD defendants' response filed November 12, 1999; Venable's reply filed on November 29, 1999; the Friedman Defendants' response filed December 6, 1999; and Venable's consolidated reply filed December 16, 1999.

In the order of September 30, 1999 the court determined that to succeed on his First Amendment claim, Venable had to allege the deprivation of a constitutional right and establish all of the elements of the common law tort of malicious prosecution. In reaching this conclusion, the court relied on *Johnson v. Louisiana Dept. Of Agriculture*, 18 F.3d 318 (5th Cir. 1994) and *Colson v. Grohman*, 174 F.3d 498 (5th Cir. 1999). Venable takes issue with the court's reliance on *Johnson*, a First Amendment malicious prosecution retaliation case. Venable asserts that he is not alleging a First Amendment malicious prosecution case. Instead, Venable explains that he alleges a First Amendment retaliation case and a common law malicious prosecution claim. Venable then argues that he should not have to establish the elements of the state law tort of malicious prosecution in order to prevail on his First Amendment retaliation claim. In support of his argument, Venable points to other First Amendment retaliation cases where courts did not require the plaintiffs to establish the elements of an underlying tort in addition to the alleged constitutional violation. The court does not disagree with Venable's characterization of his claims. Nonetheless, Venable' First Amendment claim is that the defendants retaliated against his exercise of First Amendment rights by filing civil lawsuits against him. In *Johnson*, the plaintiff complained that he was cited for violations by a state regulatory agency in retaliation for plaintiff's exercise of First Amendment rights. The Fifth Circuit characterized the claim as "one for malicious prosecution in violation of Johnson's First Amendment rights." *Johnson v. Louisiana Dept. Of Agriculture*, 18 F.3d at 320. Venable attempts to

distinguish *Johnson* on the bases that the First Amendment right involved in his case is different than in *Johnson* and because the alleged retaliation involved the filing of civil lawsuits rather than the giving of citations. The court is not presuaded by this argument. The allegations in both *Johnson* and this case are that a governmental entity retaliated against a citizen by use of some type of legal process because of the citizen's exercise of First Amendment rights. Hence, the court finds that Venable's claims are properly characterized as First Amendment malicious prosecution retaliation claims as they were in *Johnson*. Venable relies on *Enlow v. Tishomingo County, Mis.*, 962 F.2d 501 (5th Cir. 1992) (*Enlow* I) and 45 F.3d 885 (5th Cir. 1995) (*Enlow* II), in support of his argument that there is no requirement that he must establish the elements of the malicious prosecution tort. *Enlow* involved an allegation by the plaintiffs that they had been indicted in retaliation for exercising their First Amendment rights. However, the decision in *Enlow* turned on the finding that no retaliatory intent existed. The issue of proving the elements of the underlying malicious prosecution tort was not raised in that case and was not before the court. In the absence of more clear authority, the court remains convinced that *Johnson* provides the proper framework for analysis in this case. The *Johnson* court noted that if the First Amendment protects against malicious prosecution, a plaintiff must not only allege a deprivation of a constitutional right, but must also establish all of the elements of the underlying tort claim. *Johnson v. Louisiana Dept. of Agriculture*, 18 F. 3d at 320. Since Venable has failed to establish his malicious prosecution claim, his First Amendment claim also fails.

Alternatively, if Venable is correct that he does not need to establish the elements of an underlying tort to prove his First Amendment retaliation claim, Venable's First Amendment claim still fails. The Fifth Circuit has consistently held that not all actions which may infringe on a citizen's First Amendment rights are actionable. In *Colson v. Grohman*, 174 F.3d 498 (5th Cir. 1999), the court noted that "although some actions . . . may have the effect of chilling protected speech, they are not actionable." *Id.* at 511. The *Colson* court further noted that *Johnson v. Louisiana Dept. Of Agriculture* was consistent with the Circuit's general rule that a "plaintiff must cross a certain threshold of harm before [h]e can bring a claim for First Amendment retaliation." *Id.* at 513, fn. 8. In this case, Venable identifies two specific acts of the school district which he maintains were taken in retaliation for Venable's exercise of his First Amendment rights. The first act was the filing of a declaratory judgment action in state court after Venable made a request for documents under the Texas Open Records Act. This suit was promptly dismissed after counsel for Venable informed the school district that Venable was not a proper party to the suit due to a recent change in the law. The second act was DISD's filing of a counterclaim for wrongful injunction after Venable filed suit and obtained a temporary restraining order against DISD. On the same day that Venable obtained the temporary restraining order, the school district obtained a stay of the restraining order from a court of appeals. Venable ultimately dismissed his injunction suit against the district, and DISD's counterclaim was also later dismissed by the court. Venable alleges that DISD and its attorneys embarked on an all

out legal assault against Venable in retaliation for Venable's exercise of his First Amendment rights and points to a resolution adopted by the school board on June 22, 1995. However, as the magistrate judge noted in his Findings and Recommendation, the only litigation initiated by the district against Venable after the resolution was adopted were the declaratory judgment action and the counterclaim for wrongful injunction. One suit was in response to a request by Venable for documents pursuant to the Texas Open Records Act, and the other was in response to a temporary restraining order obtained by Venable which was stayed by the court of appeals on the same day the order was issued. On the facts contained in the summary judgment record, the court finds that Venable has not "crossed that certain threshold of harm" such that he can bring a First Amendment retaliation claim predicated on the above described actions of the school district. While the school district should not be allowed to use the court system to retaliate against a citizen's exercise of First Amendment rights, the district cannot be hamstrung to the point of being unable to defend itself against perceived frivolous litigation.[1] The court has reviewed the remaining arguments in Venable's motion for reconsideration and finds them to be without merit. Accordingly, plaintiff's motions for reconsideration of the court's order of September 30, 1999 are Denied.

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[1] The court notes that Venable had available the remedy of seeking sanctions against the school district in the state court where the suits were filed if the district's suits were found to be frivolous.

Signed this 24th day of January 2000.

/s/ Jorge A. Solis
Jorge A. Solis
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10198
Summary Calendar

DON VENABLE,

Plaintiff-Appellant,

versus

KATHLEEN LOES; ET AL.,

Defendants,

CHAD WOLLERY; LARRY FRIEDMAN;
FRIEDMAN & ASSOCIATED; ALAN B. RICH;
DAVID REESE; SCHWARTZ & EICHELBAUM PC;
DENNIS J. EICHELBAUM,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:97-CV-2187

(Filed Sep. 27, 2000)

Before DAVIS, JONES and DEMOSS, Circuit Judges.

PER CURIAM:*

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*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Don Venable, a self-professed watchdog over the Dallas Independent School District (DISD), appeals the district court's grant of summary judgment for the defendants in his 42 U.S.C. § 1983 action against Chad Woolery, General Superintendent of the Dallas Independent School District, and the attorneys representing Woolery.

Venable contends that the trial court erred in requiring him to prove the elements of the allegedly analogous tort of malicious prosecution as part of his First Amendment retaliation claim. He also argues that the district court erred by requiring him to demonstrate an elevated degree of injury.

In his single allegation of harm, that his access to his $1,000 bond was delayed, Venable has not crossed the threshold of actionable harm required under § 1983 on his claim for First Amendment retaliation. *Colson v. Grohman*, 174 F.3d 498 (5th Cir. 1999); *Pierce v. Texas Dep't of Criminal Justice, Inst. Div.*, 37 F.3d 1146, 1150 (5th Cir. 1994). The district court did not err.

We further find that Venable's appeal is without arguable merit and is frivolous. *See Howard v. King*, 707 F.2d 215, 219-20 (5th Cir. 1983). Because the appeal is frivolous, it is DISMISSED. *See* 5TH CIR. R. 42.2. Venable's petition for en banc consideration and his motion to expedite such consideration are DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-11111
Summary Calendar

DON VENABLE; ET AL

Plaintiffs

RICHARD E FINLAN

Plaintiff - Appellant

v.

WILLIAM KEEVER, ET AL

Defendants

WILLIAM KEEVER; DENNIS J EICHELBAUM; LAWRENCE J. FRIEDMAN; ALAN B RICH

Defendants - Appellees

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:96-CV-580-L

(Filed Jun. 12, 2001)

Before KING, Chief Judge and WIENER and DENNIS, Circuit Judges. PER CURIAM:*

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*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Richard E. Finlan appeals the district court's grant of summary judgment for the defendants in his 42 U.S.C. § 1983 action. The district court held that Finlan's allegations that the defendants filed a retaliatory counterclaim in violation of his First Amendment rights to access to the courts and to petition the government did not allege the violation of a clearly established constitutional right.

Finlan argues that he has a constitutional right to file lawsuits free from retaliation by government officials. He contends that it is a clearly established right that the Government cannot take retaliatory action against an individual designed to punish or chill the exercise of First Amendment rights to free speech or to petition the Government. He contends that Keever's declaratory judgment counterclaim was intended to punish him for his First Amendment activities.

Finlan cites *Hale v. Townley*, 45 F.3d 914, 920 (5th Cir. 1995) and *Crowder v. Sinyard*, 884 F.2d 804, 813 (5th Cir. 1989) in support of his argument that the right to be free from retaliation for exercising the right of access to the courts was clearly established. However, the right the official is alleged to have violated must have been clearly established in a particularized and relevant sense, meaning that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hale*, 45 F.3d at 920 (internal quotations and citation omitted). The issue in this case is whether the contours of the right to be free from retaliation for exercising the First Amendment rights in question include the right to be free from a counterclaim.

We rejected an almost identical claim of an alleged retaliatory counterclaim filed by the defendant in a Title VII lawsuit in *Scrivener v. Socorro Indep. School Dist.*, 169 F.3d 969, 972 (5th Cir. 1999). We stated that "[i]t is not obvious that counterclaims or lawsuits filed against a Title VII plaintiff ought to be cognizable as retaliatory conduct under Title VII. After all, companies and citizens have a constitutional right to file lawsuits, tempered by the requirement that the suits have an arguable basis." *Id.* There is no clearly established right to be free from a counterclaim filed by a government official. The district court addressed Finlan's retaliation claim adequately and properly granted summary judgment for the defendants.

Finlan argues that the district court erred in assessing costs against him because his suit was not frivolous. The decision of the district court to award costs is reviewed for abuse of discretion. *Cypress-Fairbanks Indep. School Dist. v. Michael F.*, 118 F.3d 245, 256 (5th Cir. 1997). Fed. R. Civ. P. 54(d) (1) provides that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Rule 54(d) creates a strong presumption that the prevailing party will be awarded costs. *Schwarz v. Folloder*, 767 F.2d 125, 131 (5th Cir. 1985).

The defendants prevailed, and Finlan offers no argument as to why the district court should not have awarded costs under the standards of Rule 54(d). His argument that the defendants should not have been awarded costs unless his lawsuit was determined to be frivolous is not the correct standard for assessing costs.

We further find that Finlan's appeal is without arguable merit and is frivolous. *See Howard v. King*, 707 F.2d 215, 219-20 (5th Cir. 1983). Because the appeal is frivolous, it is DISMISSED. *See* 5TH CIR. R. 42.2. Appellee William Keever's motion to accept his appendix as filed is GRANTED.

APPEAL DISMISSED AS FRIVOLOUS; MOTION GRANTED.

Supreme Court, U.S.
FILED
AUG 24 2001
OFFICE OF THE CLERK

No. 00-1940

In The

Supreme Court of the United States

RICHARD E. FINLAN,

Petitioner,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT, SANDY KRESS, CHAD WOOLERY, HOLLIS BRASHEAR, WILLIAM KEEVER, LYNDA McDOW, KATHLEEN LEOS, YVONNE EWELL, LARRY FRIEDMAN, ALAN RICH, FRIEDMAN & ASSOCIATES, P.C., DENNIS EICHELBAUM, and SCHWARTZ & EICHELBAUM, P.C.,

Respondents.

On Petition For A Writ Of Certiorari To The Texas Supreme Court

RESPONDENTS SCHWARTZ & EICHELBAUM, P.C. AND DENNIS EICHELBAUM'S RESPONSE TO FINLAN'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The state court of appeals below concluded that the filing of the DISD conspiracy lawsuit against Finlan did not violate his First Amendment rights. The DISD conspiracy claims were based on Finlan's alleged conduct of conspiring with others to defraud the DISD by obtaining a consent judgment against the DISD. The state court of appeals concluded that the summary judgment evidence raised fact issues on whether Finlan conspired to defraud the DISD. By so concluding, the court of appeals necessarily confirmed that the DISD had probable cause to bring the conspiracy lawsuit against Finlan. The existence of probable cause to bring the DISD conspiracy lawsuit against Finlan provides independent and adequate state grounds to support summary judgment against Finlan. As such, does this Court have jurisdiction?

2. The final judgment, if any, subject to review by writ of certiorari is that of the state court of appeals. In his petition for writ of certiorari to this Court, Finlan has sought review of the Texas Supreme Court's discretionary denial of his petition for review to that court. Because he has failed to seek review of the state court of appeals' judgment, does this Court have jurisdiction?

3. The Lawyer Defendants[1] sought and were granted summary judgment on two grounds: (1) the merits of Finlan's § 1983 claims, and (2) the defense of

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[1] Respondents Schwartz & Eichelbaum, P.C., and Dennis Eichelbaum are referred to herein as the "Lawyer Defendants."

QUESTIONS PRESENTED – Continued

qualified immunity. The state court of appeals affirmed the summary judgment *in toto*, although it did not reach the issue of qualified immunity. Here, Finlan has not challenged the summary judgment in favor of the Lawyer Defendants on immunity grounds. Because there exists an independent basis for affirmance of the judgment below and because Finlan has not challenged that independent basis, should this Court deny petition?

4. Does this Court's holding in *Albright v. Oliver* – not cited or discussed in Finlan's Petition – preclude Finlan from claiming that he had "substantive Fourteenth Amendment rights" that were violated by acts of the Respondents?

5. Did the state court of appeals correctly conclude that the filing of the civil lawsuit in question against Finlan was not a constitutional violation?

6. Doesn't *Paul v. Davis* and the Fifth Circuit's *Colson v. Grohman* provide an alternative ground to support the decision below?

7. Doesn't Rule 13 of the Texas Rules of Civil Procedure comply with the requirements of the *Parratt/Hudson* Doctrine so that Finlan cannot assert claims under § 1983?

8. Can Finlan claim that the filing of the DISD's September 13, 1995 lawsuit against him was in retaliation for the exercise of his First Amendment rights when the Texas Court has concluded that machinations between

QUESTIONS PRESENTED – Continued

Finlan, Ed Grant and others in the "162nd Civil Rights Lawsuit" are the "basis" for the DISD lawsuit?

9. Should Finlan be allowed to relitigate in this cause claims he has already unsuccessfully asserted in other lawsuits?

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I. THE PETITION SHOULD BE DISMISSED FOR LACK OF JURISDICTION

A. Judgment Based on Independent and Adequate State Grounds.

The judgment of the court below is based on independent and adequate state grounds; therefore this Court lacks jurisdiction. *E.g., Black v. Cutter Laboratories,* 351 U.S. 292, 297-98 (1956); *Herb v. Pitcairn,* 324 U.S. 117, 125 (1945). When the DISD sued Finlan, et al., in September 1995, Finlan quickly filed his § 1983 counterclaim charging that the suit was filed in retaliation for his exercise of First Amendment rights. The court below not only held Finlan's rights had not been violated by the filing of the lawsuit (27 S.W.3d at 240-44), it effectively confirmed that the DISD had probable cause to make the filing and reversed the trial court's summary judgment in Finlan's favor:

> We conclude DISD's evidence raises fact questions concerning the alleged agreement among Finlan, Venable, and Grant to defraud DISD by obtaining consent judgments against DISD regardless of the merits of Finlan's and Venable's civil rights suit in the 162nd District Court and to collect the judgments from the TASB.

(27 S.W.3d at 232).

DISD's probable cause obviously inures to the Lawyer Defendants. Because there exist independent and adequate state grounds to support the judgment below, Finlan's petition should be dismissed for lack of jurisdiction.

B. Finlan Seeks Certiorari And Review of Decision of Wrong Court.

It is the opinion of the Texas court of appeals, the Fifth District Court of Appeals at Dallas, which would, if at all, be subject to review.[2] After that opinion was rendered, Finlan filed a Petition for Review with the Texas Supreme Court, which was denied. (Appendix 1). Rule 56.1(a) of the Texas Rules of Appellate Procedure provides that when a petition for review is filed with the Texas Supreme Court, whether to grant review is a matter of "judicial discretion." The final judgment subject to review here is that of the Texas court of appeals; Finlan has sought review of the discretionary denial by the Texas Supreme Court of his petition for review. As such, his Petition should be denied for want of jurisdiction. *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954).

II. FEDERAL STATUTE INVOLVED: SECTION 1983

Finlan's action below was predicated upon an asserted violation of 42 U.S.C. § 1983, not on a direct violation of the First Amendment. Section 1983 provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any

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[2] The Opinion of the Dallas Court of Appeals, *DISD v. Finlan*, 27 S.W.3d 220 (Tex. App. – Dallas 2000, pet. denied) can be found at Finlan Appendix 1.

> citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

III. STATEMENT OF THE CASE

The Lawyer Defendants object to Finlan's "Statement of the Case." Finlan is correct that in the early '90s, he made a number of allegations of improprieties concerning the DISD's handling of its bond funds. And, along with his then cohort, Don Venable, filed a lawsuit based on those allegations. This led to the appointment of the Texas Commissioner of Education as Master and his hiring of Deloitte & Touche. The accounting firm's report did reveal shortcomings in the DISD's accounting records, but nothing like the massive frauds asserted by Finlan.

The "Background" section of the Opinion of the state court of appeals below, found at 27 S.W.3d at 230 (pp.12-13 of Finlan's Appendix), reveals the following:

a. The DISD sued Finlan and Venable in October 1992 "for tortious interference with the relationship and contract between the board and Goldman, Sachs & Company" (the "1992 DISD Tortious Interference Lawsuit").

b. In response to the "1992 DISD Tortious Interference Lawsuit," Finlan and Venable filed (i) a civil rights counterclaim against the DISD, and (ii) in 1994, a civil rights lawsuit against Respondents in the 162nd Texas District Court (the "162nd Civil Rights Lawsuit").

c. Ed Grant, who had been a DISD Trustee and was named as a counterdefendant in the "1992 DISD Tortious Interference Lawsuit" and as a defendant in the "162nd Civil Rights Lawsuit," confessed judgment on Finlan's § 1983 claims, retained Venable's lawyer, Ron Hinds, to represent him in a crossclaim against the DISD lawyers who had advised that the "1992 DISD Tortious Interference Lawsuit" be filed, and, together with Finlan, "presented an agreed judgment in favor of Finlan for $300,000 to the judge who signed it."

However, it is important to note that the filing by the DISD of the 1992 DISD Tortious Interference Lawsuit (as well as the other matters Finlan recites which relate to that lawsuit) is not a basis for the § 1983 claims which Finlan brought in this case. The court of appeals' Opinion specifically describes the two lawsuits filed by the DISD (or its Trustees) against Finlan which Finlan claimed were retaliatory and which form the basis of Finlan's § 1983 claims in this case:

(1) A September 6, 1995 declaratory judgment action against Finlan regarding disclosure of the DISD Trustees' campaign finance reports; and

(2) A September 13, 1995 amended petition (in the same declaratory judgment action) against Finlan, wherein the DISD alleged that Finlan, as a result of the "agreed judgment" in the 162nd Civil Rights Lawsuit, had conspired to defraud the DISD and its taxpayers.

(27 S.W.3d at 240-41).

Thus, despite Finlan's reference to the 1992 Tortious Interference Lawsuit, it did not form a basis of his complaints in this case.

Although Finlan references the matters described in a. through c. above, he fails to inform this Court what happened to his claims in the 1992 DISD Tortious Interference Lawsuit and to Finlan's and Venable's claims in the 162nd Civil Rights Lawsuit. After the DISD's petition was dismissed, the parties to the 1992 litigation were realigned with the counterclaimants becoming plaintiffs. The 162nd Civil Rights Lawsuit was consolidated with the 1992 suit which was then pending in the 101st Texas State District Court. (DISD Appendix 1). Summary Judgment was granted to the DISD and the DISD Respondents on Finlan's and Venable's § 1983 claims by Order dated July 26, 1999. (DISD Appendix 2). On June 19, 2000, Final Judgment was entered confirming the earlier grant of summary judgment and granting summary judgment to the Lawyer Defendants. (DISD Appendix 6). Finlan has perfected an appeal which pends before the Court of Appeals for the Eleventh District of Texas (at Eastland, Texas).

On page 6 of the Petition, Finlan tells of his request to superintendent Woolery to provide copies of campaign finance information of the school board members. This resulted in the DISD's filing the September 6, 1995 declaratory judgment suit against him and Venable, who had made a similar demand. This filing, of course, drew a § 1983 counterclaim by Finlan which was later expanded to include Finlan's § 1983 counterclaim that the filing of

the RICO lawsuit against him also violated his constitutional rights. These are the claims involved in the case at bar.

However, Venable filed a separate lawsuit in federal court claiming that the September 6th filing violated § 1983. After summary judgment was granted to the defendants (DISD Appendix 11), Venable did not pursue his claims relating to the September 6th filing. He did appeal another asserted § 1983 violation relating to a bond forfeiture proceeding. The Fifth Circuit, in a per curiam opinion, found that this appeal "is without arguable merit and is frivolous" and ordered it dismissed. (DISD Appendix 17).

Another related lawsuit began with the filing in 1994 by Finlan and Venable of a declaratory judgment action against William Keever, then a DISD Trustee, seeking his campaign finance records. Keever filed a declaratory judgment counterclaim that those records were not covered by the Open Records Act. This counterclaim provoked § 1983 counterclaims by Finlan and Venable against Keever and his lawyers which were removed to federal court. After summary judgment was granted to the defendants, Finlan perfected an appeal to the Fifth Circuit which found that his appeal "is without arguable merit and is frivolous" and ordered it dismissed. (DISD Appendix 19).

Finally, Finlan's characterization of the state court of appeals Opinion is erroneous. Finlan argues:

> The Dallas Court of Appeals decided Finlan's case on the threshold issue of standing, taking the position that Finlan had no right to be free

> of government retaliation and that his suit should be dismissed.

(Finlan's Petition at 8).

Finlan is incorrect. The Dallas Court of Appeals affirmed summary judgment in favor of the Lawyer Defendants on the merits. (27 S.W.3d at 244-45).

IV. FINLAN HAS FAILED TO CHALLENGE, IN THIS COURT, INDEPENDENT GROUNDS WHICH ALLOWED AFFIRMANCE OF THE JUDGMENT BELOW

In the trial court, the Lawyer Defendants moved for summary judgment on the merits of Finlan's civil rights claim, ***and*** on the Lawyer Defendants' defense of qualified immunity. (27 S.W.3d at 220, 241). The trial court granted the Lawyer Defendants' motion for summary judgment against Finlan's civil rights claims. (27 S.W.3d at 220). Finlan challenged both grounds in appealing the summary judgment. (27 S.W.3d at 240-41, 244)(Finlan's Cross-Point Five). The Court of Appeals affirmed the summary judgment in favor of the Lawyer Defendants without reaching the propriety of their summary judgment motion on qualified immunity grounds.

Even though the state court of appeals did not reach the issue of the Lawyer Defendants' qualified immunity, it nonetheless affirmed the trial court's grant of summary judgment – which was based on two independent grounds: (1) the merits of Finlan's § 1983 claims, and (2) the Lawyer Defendants' qualified immunity defense. In his Petition to this Court, Finlan does not challenge the grant of summary judgment in favor of the Lawyer

Defendants on the basis of qualified immunity. Because Finlan has failed to challenge an independent basis in support of the summary judgment below, Finlan's Petition should be summarily denied.

In the alternative, and without waiving the foregoing, the Lawyer Defendants were entitled to summary judgment on qualified immunity for the same reasons set forth in the Opinion of the court of appeals below. (27 S.W.3d at 242-45)("Accordingly, we hold that in 1995 there was no clearly established law that the filing of a civil suit in retaliation violated an individual's free speech right."); *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987) and *Foster v. City of Lake Jackson*, 28 F.3d 425, 429 (5th Cir. 1994) (analysis of what constitutes "clearly established"); *Kerr v. Lyford*, 171 F.3d 330, 342-43 (5th Cir. 1999) (J. Jones concurring opinion); *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982); *Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir. 1997), *cert. den.*, 523 U.S. 1094 (1998) (private attorney working on behalf of city is entitled to qualified immunity).

V. FINLAN HAS NOT ALLEGED A DEPRIVATION OF A CONSTITUTIONAL RIGHT

This Court has stated:

> The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right "secured by the Constitution and laws." If there has been no such deprivation, the state of mind of the defendant is wholly immaterial.

Baker v. McCollan, 443 U.S. 137, 140 (1979). The state court of appeals correctly concluded that there was no violation

of § 1983 committed by the filing of the civil lawsuit. (27 S.W.3d 220, 244)("We have held the filing of the civil case was not a constitutional violation."). Moreover, despite Finlan's argument, there is no conflict between the decision below and any of the decisions of this Court which Finlan discusses, quotes or cites in his Petition.

There is one decision of this Court – *Albright v. Oliver*, 510 U.S. 266 (1994) – that is on point. The decision below is completely compatible with *Albright*, and is, through its reliance on *Johnson v. Louisiana Dep't of Agriculture*, 18 F.3d 318 (5th Cir. 1994), derived from *Albright*. Finlan does not cite *Albright*.

Petitioner's claim in *Albright* was that "the action of respondents (in prosecuting criminal charges against him) infringed his substantive due process right to be free of prosecution without probable cause." (510 U.S. at 271). Here, Finlan argues that the action of Respondents violated his "substantive Fourteenth Amendment rights" (Petition p. 19) by the filing of the civil claims – regardless of whether or not there was probable cause. Obviously the four members of the *Albright* plurality are not going to extend "the protections of substantive due process" to Finlan's complaints about a civil proceeding. (*Id.* at 271-72).

Justice Scalia, concurring, "reject(s) the proposition that the Due Process clause guarantees certain unspecified liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty." (*Id.* at 275). By so doing, he rejects Finlan's claim here. Justice Ginsburg agreed that Albright's claim is "properly analyzed under the Fourth Amendment rather

than under the heading of substantive due process." (*Id.* at 276). Further, there was not a seizure of Finlan here as there was of Albright, which made the difference between her analysis and that of the plurality. Justice Kennedy's concurrence – joined by Justice Thomas – agrees that Albright's claim "must be analyzed under the Fourth Amendment without reference to more general considerations of due process." (*Id.* at 281). Justice Souter also agreed that "petitioner has not justified recognition of a substantive due process violation in his prosecution without probable cause." (*Id.* at 286). Lastly, Justice Stevens' dissent – in which Justice Blackburn joined – provides no solace to Finlan in that its analysis is derivative of the principle that "The Fifth Amendment to the Constitution constrains the power of the Federal Government to accuse a citizen of an infamous crime." (*Id.* at 291).

In summary, Finlan can find no support in any of the *Albright* opinions for his claim of a violation of substantive due process. Worse for him, the plurality and concurring opinions are fatal to his position.

At the Circuit level, there are a number of cases that hold that there is no violation of § 1983 presented by the filing of a civil lawsuit or counterclaim. Among other Fifth Circuit opinions finding no violation of § 1983 in the filing of civil litigation by a governmental entity are *Whittington v. Johnston*, 201 F.2d 810 (5th Cir. 1953); *Curry v. Ragan*, 257 F.2d 449 (5th Cir.), *cert. den.*, 35 U.S. 851 and *reh den.*, 358 U.S. 914 (1958); *Beker Phosphate Corp. v. Muirhead*, 581 F.2d 1187 (5th Cir. 1978); *Whatley v. Philo*, 817 F.2d 19 (5th Cir. 1987); and, of course, *Johnson v. Louisiana Dep't of Agriculture*, 18 F.3d 318 (5th Cir. 1994).

Among other circuits that have reached a similar conclusion that the filing of a civil lawsuit does not implicate § 1983 are *Moffett v. Commerce Trust Co.*, 187 F.2d 242 (8th Cir. 1951); *Bell v. School Bd. of City of Norfolk*, 734 F.2d 155 (4th Cir. 1984); *Paskaly v. Seale*, 506 F.2d 1209 (9th Cir. 1974); *Bottone v. Lindsley*, 170 F.2d 705 (10th Cir. 1948). *See also Bradford v. Lefkowitz*, 240 F. Supp. 969, 977 (S.D.N.Y. 1965) ("Neither the Fourteenth Amendment nor the Civil Rights Act purports to secure a person against unfounded or even malicious claims or suits in state courts, especially when the laws and courts of the state are available and furnish adequate remedies to a person aggrieved."). *See generally* ANNOTATION, ACTIONABILITY OF MALICIOUS PROSECUTION UNDER 42 USCS § 1983, 79 A.L.R. Fed. 896 (1986).

Of the score or more Circuit cases cited by the Petition, only three – not counting *Johnson v. LDOA* – were concerned with malicious prosecution issues. In *Harrison v. Springdale Water & Sewer Comm.*, 780 F.2d 1422 (8th Cir. 1986) the counterclaim by the government actors sought to condemn Harrison's property; a recorded *lis pendens* accompanied the filing of the lawsuit. As the Eighth Circuit observed:

> The real gist of the Harrisons' complaint is found in the statement that "if public officials are allowed to use that power [of eminent domain] to punish those who seek protection in the courts, then the courts and justice will be denied to many citizens."

(*Id.* at 1428).

In contrast to the situation here, the condemnation suit in *Harrison* worked a deprivation of property which was undertaken for the admitted purpose of coercing a

sale of the property at the city's price. Moreover, this decision predates *Albright*. The issue before the Second Circuit in the second case, *Greenwich Citizens Comm. v. Counties of Warren*, 77 F.3d 26 (2nd Cir. 1996), was whether the trial court erred in not requiring a finding that either (a) the counterclaims were filed in "retaliation" for exercise of First Amendment rights, or (b) were filed as "a legitimate response to litigation." (p. 31) That opinion was predicated on the assumption that a § 1983 violation could be based on the filing of a civil lawsuit by government actors; it never tested or addressed the correctness of such assumption. Although decided subsequently to *Albright*, it nowhere cites or considers *Albright*. The third case, *Rolf v. City of San Antonio*, 77 F.3d 823 (5th Cir. 1996) was similar to *Harrison* in that condemnation of plaintiff's land was sought – a deprivation of a property interest. Neither was *Albright* cited in *Rolf*. Under the Fifth Circuit's intra-circuit stare decisis rule, the *Rolf* panel was bound by *Johnson v. LDOA*; obviously the condemnation element of *Rolf* distinguished it from both *Albright* and *Johnson v. LDOA*.

The case most clearly on point is the case most relied upon by the court below, *Johnson v. LDOA*.[3] The Fifth Circuit opinion followed soon after this Court had handed down *Albright*. There, Johnson claimed that retaliatory administrative actions were lodged against him for

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[3] The Sixth Circuit's decision in *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 1997), *cert. den.*, 523 U.S. 1094 (1998) is in complete accord with *Johnson v. LDOA*. There, the court reversed the denial of summary judgment on qualified immunity grounds after finding that no reasonable official would have believed he was violating clearly established rights by the filing of a retaliatory lawsuit.

not making "a large enough contribution" to the Commissioner's reelection campaign and that there were "coercive attempts to stifle him in his free expression of speech." (18 F.3d at 320). The Court agreed with the district court that, if there were a § 1983 claim asserted, it was "one for malicious prosecution in violation of Johnson's First Amendment rights." (*Id.*). It immediately adds, "Whether the Constitution comprehends any such claim is far from clear." The court made clear (*Id.* at 321, fn. 2.) that prior to *Albright*, the Fifth Circuit had generally held malicious prosecution in criminal proceedings were "serious enough" to be actionable under § 1983, but not those in civil proceedings. Finlan ignores this and illogically argues that *Johnson v. LDOA* should be read as suggesting that claims of civil malicious prosecution are more serious than criminal malicious prosecutions.

Finlan to the contrary, for an administrative proceeding which resulted in sanctions and, *a fortiori*, for a purely civil action, the Fifth Circuit requires that, "at the very least" a § 1983 claimant must "establish all elements of the common law tort action." (*Id.* at 320). The court below's reversal of summary judgment for Finlan on the civil conspiracy claim (28 S.W.3d at 229-32) established probable cause and negated one essential element of Finlan's malicious prosecution cause of action. More importantly for the "deprivation" requirement of § 1983, Finlan fails to allege facts to establish a second element of a common law malicious prosecution claim, that of special damage or special injury through some physical interference with the party's person or property in the form of an arrest, attachment, injunction or sequestration. *See Texas Beef & Cattle Co. v. Green*, 921 S.W.2d 203, 209 (Tex. 1996).

Johnson v. LDOA was the first in what is an ever-expanding universe of circuit cases attempting to apply *Albright* to § 1983 claims bottomed on an alleged malicious prosecution. However, there is no conflict or confusion among the Circuits that in any way conflicts with the decision below. Some, like *Johnson v. LDOA* (and the court below), require that all of the elements of a common law malicious prosecution claim must be established.[4] Others require establishing such elements – and more.[5] But all hold that, unless a lack of probable cause can be established[6] and unless there was a "seizure,"[7] there can be no § 1983 cause of action. Finlan's § 1983 claims do not contain either the seizure element or the lack of probable cause element.

The court below was also correct in its consideration and application of relevant Fifth Circuit authorities to Finlan's claim that his right to access the courts had been illegally infringed upon. The court correctly cited and quoted *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 (5th Cir. 1994) for the proposition that such right of access is implicated only "where the ability to file suit was delayed, or blocked altogether." (27 S.W.3d at 244). And, likewise with respect to *Hale v. Townley*, 45 F.3d 914, 920

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[4] *E.g., Cervanates v. Jones*, 188 F.3d 805, 808-09 (7th Cir. 1999), *cert. den.*, 528 U.S. 1154, 145 L.Ed.2d 1071 (2000).

[5] *E.g., Lambert v. Williams*, 223 F.3d 257, 261 (4th Cir. 2000), *cert. den.*, 121 S.Ct. 889, 148 L.Ed.2d 797 (2001).

[6] *E.g., Taylor v. Meacham*, 82 F.3d 1556, 1561-62 (10th Cir. 1996), *cert. den.*, 519 U.S. 871.

[7] *E.g., Britton v. Maloney*, 196 F.3d 24, 29 (1st Cir. 1999), *cert. den.*, 530 U.S. 1204, 147 L.Ed.2d 234 (2000).

(5th Cir. 1995), to the effect that government's filing of civil suit is not an "official impediment" to the "facilitative right to institute a suit." *Id.*[8]

Further support for the court below can also be found in *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989), *cert. den.*, 496 U.S. 924 (1990). There, the court was asked to adopt the Eighth Circuit's holding in *Harrison v. Springdale Water & Sewer Comm.*, cited *supra*, that the filing of the retaliatory counterclaim stated a cause of action for infringement of the constitutional right of access to the courts. The Fifth Circuit expressly declined to approve or disapprove such holding. (884 F.2d at 812-13 fn. 9). Therefore, it has not been established in Fifth Circuit jurisprudence that there exists a constitutional right of access to the courts as Finlan would frame such right.

The court below is eminently correct in its holding that "the filing of the civil case was not a constitutional violation. . . . " (27 S.W.3d at 244).

VI. *PAUL V. DAVIS* AND *COLSON V. GROHMAN* PROVIDE ALTERNATIVE GROUNDS OF SUPPORT FOR THE OPINION BELOW

This Court, in *Paul v. Davis*, 424 U.S. 693 (1976), rejected a § 1983 claim based on the distribution of flyers

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[8] In addition, the Court below noted that Finlan did not allege or establish that his ability to file suit was in any way delayed or blocked altogether. Rather, the Court noted that Finlan has been a frequent party to litigation against the DISD Trustees. (27 S.W.3d at 244).

by the police which had plaintiff's picture on them and identified him as a shoplifter when he had been arrested, but not prosecuted, for such crimes. In essence, *Paul v. Davis* held that, without more, injury to reputation does not implicate a protected liberty or property interest. *Id.* at 711-12. Such "reputational damages" are all the injury that Finlan asserts here. Other courts have recognized that the mere filing of a lawsuit is not essentially different from the "reputational damages" visited by the defamation of a false accusation. *See Albright v. Oliver*, 975 F.2d 343, 345-46 (7th Cir. 1992) (If the injuries[9] that defamation imposes do not constitute a deprivation of liberty or property within the meaning of the due process clause, then neither do the injuries that malicious prosecution imposes). *Smart v. Bd. of Trustees of University of Illinois*, 34 F.3d 432, 434 (7th Cir. 1994) (If liberty is not at stake, it is difficult to see how either tort [malicious prosecution or the use of process] could be thought to invade an interest protected by the due process clause (life, liberty, property) merely by virtue of its effect upon the reputation, or, like any suit, the pocketbook of the defendant).

In a later Seventh Circuit case, *Spiegel v. Rabionovitz*, 121 F.3d 251 (7th Cir. 1997), the plaintiff claimed § 1983 damages due to his eviction, his adverse employment status and loss of income. The district court found that Spiegel's eviction was a probable consequence of his

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[9] The court noted that such injuries could include embarrassment, outrage, and the undermining of one's ability to make favorable transactions (business or personal) which thereby subjects one to pecuniary and non-pecuniary costs. *Albright*, 975 F.2d at 345-46. Of course, this is no different than Finlan's argument herein.

malicious prosecution. The Seventh Circuit disagreed and reversed:

> Although Spiegel's circumstances are unfortunate, the rationale of *Smart* instructs that none of them are deprivations of property of a constitutional magnitude.

(*Id.* at 256). Finlan's nearly identical claimed damages are likewise not deprivations.

The Fifth Circuit's opinion in *Colson v. Grohman*, 174 F.3d 498 (5th Cir. 1999) is likewise fatal to Finlan's § 1983 claims. Finlan's claims here are

> . . . inconsistent with our recent case law unequivocally holding that retaliatory criticisms, investigations, and false acquisitions that do not lead to more tangible adverse action are not actionable under § 1983.

(*Id.* at 513). The "recent case law" and sole authority cited in support of that statement in the accompanying footnote 8 is *Johnson v. LDOA*, which is said to be "consistent with our general rule that the plaintiff must cross a certain threshold of harm before she can bring a claim for First Amendment retaliation." (*Id*). The opinion concludes that Colson "has not alleged any First Amendment *deprivation* actionable under § 1983." (*Id.* at 514 – emphasis supplied). Citing *Paul v. Davis*, the opinion further concludes that there was no infringement as to "her Fourteenth Amendment due process claim" – described as resting "on a theory that she suffered harm to her reputation coupled with the denial of her constitutional rights to be without retaliation." (*Id*). Finlan is in no different position than Colson. He is not entitled to a recovery under § 1983.

VII. ANOTHER SUPPORTING AUTHORITY: THE *PARRATT/HUDSON* DOCTRINE

As discussed hereinabove, the filing of the civil suit against Finlan did not violate his First Amendment rights or his Fourteenth Amendment substantive due process rights. To the extent Finlan argues that his procedural due process rights were violated, such an argument should be flatly rejected under the *Parratt/Hudson* doctrine.[10] Rule 13 of the Texas Rules of Civil Procedure[11] is the state law analogue of Rule 11 of the Federal Rules of Civil Procedure. Through it, Texas has provided a process through

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[10] *See Hudson v. Palmer*, 468 U.S. 517 (1984); *Parratt v. Taylor*, 451 U.S. 527 (1981) (where state provides adequate post-deprivation remedy, no procedural due process rights are violated).

[11] Rule 13 provides, in relevant part:

> The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both.

which Finlan could seek redress for any claimed injury occasioned to him by the DISD's filing of the lawsuit against him. Rule 13 clearly meets the *Parratt/Hudson* requirement of a state-provided adequate post-deprivation remedy. *See also, Charbonnet v. Lee*, 951 F.2d 638, 644 (5th Cir. 1992). The *Parratt/Hudson* doctrine provides yet one more reason why Finlan's writ should be denied.

VIII. CONCLUSION

The Lawyer Defendants respectfully request that this Court note its lack of jurisdiction and dismiss Finlan's Petition, or, in the alternative, deny Finlan's Petition.

Respectfully submitted,

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RE: Case Number 00-1191
Court of Appeals Number: 05-97-00734-CV
Trial Court Number: 97-00392-H

Style: RICHARD E. FINLAN

v.

DALLAS INDEPENDENT SCHOOL DISTRICT, SANDY KRESS, CHAD WOOLERY, HOLLIS BRASHEAR, WILLIAM KEEVER, LYNDA MCDOW, KATHLEEN LEOS, YVONNE EWELL, JOSE PLATA, LARRY FRIEDMAN, ALAN RICH, DAVID REESE, FRIEDMAN & ASSOCIATES, P.C., DENNIS EICHELBAUM, and SCHWA * * *

[SEAL] **THE SUPREME COURT OF TEXAS**
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Dear Counsel:

Today, the Supreme Court of Texas denied the two petitions for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Tanya R. Hunter
Tanya R. Hunter, Deputy Clerk

cc: Ms. Lisa Matz, Clerk
Mr. Jim Hamlin
Mr. Richard E. Finlan
Mr. Ed Grant
